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1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 CASE NO. 08-01789-smb

4 - - - - - x
5 SECURITIES INVESTOR PROTECTION
6 CORPORATION

7 v.

8 BERNARD L. MADOFF INVESTMENT
9 SECURITIES, LLC, et al,

10 Debtors.

11 - - - - - x

12 U.S. Bankruptcy Court
13 One Bowling Green
14 New York, New York

15

16 September 17, 2014

17 1:32 PM

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21 B E F O R E :

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: K. HARRIS

Page 2

1 HEARING Matter: Status Conference re Affect Dist. Ct.

2 Extraterritoriality Order

3

4 HEARING Matter: Becker & Poliakoff LLP Motions to Dismiss

5 and Motions to Dismiss Listed on Appendix A to the Trustees

6 February 20 Letter to the Court, as amended

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good afternoon.

3 Madoff.

4 UNIDENTIFIED: Yes, Your Honor.

5 MR. LACY: Good morning, Your Honor, I'm Rob Lacy
6 from Sullivan & Cromwell, and we're here for a conference
7 that I requested about a month ago.

8 We're talking about a lot of proceedings at once,
9 and I have a chart which I have distributed already --

10 THE COURT: Yes.

11 MR. LACY: -- and I'd like to hand it out.

12 THE COURT: Thank you.

13 MR. LACY: Let me at the same time hand up a
14 second chart, and I will explain what these two things are.

15 THE COURT: Thank you.

16 MR. LACY: I'm told Ms. Griffin and Mr. Long did
17 not get this until two hours ago, and I would make clear
18 that they were not expected to be able to comment on the
19 accuracy at this point.

20 THE COURT: Well, I only got it a minute ago.

21 MR. LACY: It's described as a draft, and I mean
22 it to be a draft for the time being.

23 The figure chart, the one that says Consolidated
24 Extraterritoriality Motion is --

25 THE COURT: Excuse me, do you have an extra chart

1 for my clerks? Thank you.

2 MR. LACY: Lots.

3 THE COURT: I don't want them to feel left out.

4 MR. LACY: Okay.

5 THE COURT: Thank you.

6 MR. LACY: The chart that says Consolidated
7 Extraterritoriality Motion is our effort to list the claims
8 that would be dismissed if you take Judge Rakoff's order to
9 mean that you have to dismiss any claim involving a transfer
10 between a foreign transferor and a foreign subsequent
11 transferee.

12 THE COURT: How many adversary proceedings are --

13 MR. LACY: They're listed, Your Honor. If you
14 look at the last page, you'll see that there's 74 on this
15 chart.

16 THE COURT: Okay.

17 MR. LACY: And you will also see that there are
18 hundreds of defendants.

19 If you look at page 14 -- we did this by order of
20 docket number, and that means the oldest and most
21 complicated cases are first, but if you look at page 14,
22 between pages 14 and 19, there is a rapid fire list of 41
23 proceedings, in which we think all of the claims would be
24 dismissed under an application of Judge Rakoff's ruling.

25 And then there are four or five others scattered

Page 11

1 through the rest of the chart. The 74 proceedings on this
2 chart includes 66 of the proceedings in which the trustee is
3 moving to amend the complaint.

4 Your Honor, the --

5 THE COURT: Go ahead.

6 MR. LACY: The other smaller chart, which is
7 called Additional Extraterritoriality Defendants, these are
8 defendants that did not move to withdraw based on
9 extraterritoriality, and so they were not covered by Judge
10 Rakoff's consolidated briefing and decision.

11 But they believe and we believe that they are in
12 the same situation, so that if you applied a rule and a
13 transfer from an -- from a foreign transferor to a foreign
14 subsequent transferee can't be recovered, all of these
15 claims would get dismissed.

16 This chart has 15 proceedings that are not on the
17 first chart, so you're up to a total of 89 proceedings in
18 all. There are also a few claims here in four proceedings
19 that are in the first chart, so you have some duplication in
20 captions.

21 And the second chart includes eight more
22 proceedings that are subject to the trustee's motion to
23 amend. So if you take the two charts together, they list 49
24 of the 66 proceedings that are subject to the trustee's
25 motion.

1 Now, as you know, Judge Rakoff entered an order
2 for consolidated briefing and argument of a motion to
3 dismiss on the basis that Section -- among other things, of
4 Section 558 of the Bankruptcy Code does not apply to
5 transactions outside the United States. The order said the
6 procedures established by this order, or by further order of
7 this Court shall constitute sole and exclusive procedures
8 for determination of the extraterritoriality issue in the
9 adversary proceedings. And what he meant by adversary
10 proceedings there were the proceedings on the list attached
11 to the order.

12 We propose to continue on that consolidated basis.
13 That will maintain the efficiency of consolidated treatment,
14 you'll be able to get fools like me to spend days working on
15 charts like this, and it will make it unnecessary for the
16 defendants to obtain new orders, saying that they can make a
17 motion on one defense, without waiving other defenses, or
18 waiving the right to make motions to dismiss, based on other
19 defenses. Judge Rakoff's order included all of that
20 language.

21 The way we propose to proceed is, that we shall
22 take a couple of weeks to finalize this chart in
23 consultation with the trustee's counsel. They will have
24 time to look at it, spot what they consider to be mistakes,
25 we will talk to them about what they consider to be

1 mistakes, we'll try and work out things like that. And we
2 will get as close as we can to a stipulated schedule, that
3 will provide some basis for moving forward.

4 At the end of that time, and I haven't talked to
5 the trustee's counsel about exactly how long he'll need for
6 that, but say two weeks. At the end of the time, we'll put
7 in the revised chart, and we will put in a ten paged brief,
8 explaining why we think Judge Rakoff's order requires the
9 dismissal of all of the claims on here.

10 At that point, the trustee will be able to
11 respond, and we submit that there are three things the
12 trustee can do. First of all, if there's still
13 disagreements about the chart, we can point out what we
14 don't want on the chart.

15 The second thing is, that he can say that there
16 are things in the existing complaints, which for some reason
17 should make Judge Rakoff's ruling inapplicable to the claims
18 on this list. We don't think there are any, but it's up to
19 the trustee's counsel to have a chance to say that.

20 The third thing, which would be perfectly
21 conventional in a motion to dismiss, is that the trustee
22 could say, we would like to be able to amend the complaints,
23 to make the following specific allegations. So these would
24 be specific allegations to be added to specific complaints,
25 and he'll say, we think that if we are able to add these,

1 then we would escape the force of Judge Rakoff's ruling, and
2 we wouldn't want to dismiss this.

3 In our reply papers, we'll then do what at that
4 point will be partially a motion to amend, we'll say,
5 there's no point letting him amend now, because amendment
6 would be futile, it wouldn't change the outcome.

7 We may say, by the way that Judge Rakoff had
8 already provided with an opportunity to amend, he's missed
9 the opportunity to amend, it's too late. Any arguments that
10 go to whether there should be an amendment would all be done
11 in the opposition to this motion and the supplemental
12 briefing, and in our reply.

13 This would make the trustee's motion that was
14 filed a couple of weeks ago unnecessary insofar as it seeks
15 permission to amend to deal with extraterritoriality. The
16 trustee's motion is not seeking discovery with respect to
17 extraterritoriality, and I'll just point out that the motion
18 that the trustee filed is not actually a procedurally
19 adequate motion to amend, because he hasn't told us how he
20 would amend the complaints.

21 And the district court has held over and over
22 again under Rules 7 and 15, both of which apply to adversary
23 proceedings in this court, that in order to make a motion to
24 amend, you have to be specific about what amendment you're
25 going to make.

1 You have to be specific because the defendant is
2 entitled to oppose a motion like that by saying, that the
3 amendment would be futile, and you can't have that
4 litigation, unless you know exactly what the amendments are
5 going to be.

6 So the thing that is styled a motion to amend, an
7 omnibus motion to amend under the rules enforced in both the
8 district court and this court is actually procedurally
9 inadequate. It ought to be held in abeyance in any event.

10 Your Honor, because so many of the proceedings
11 that are subject to the trustee's motion are covered by
12 these charts -- oh, I should add, that we would like to
13 propose, if no one objects, to simply wrap the defendants
14 and the claims on the additional chart into the consolidated
15 exercise. They are not subject to Judge Rakoff's order now,
16 but they raise the same issue, the issue's going to be
17 litigated at some point. It seems to me that it would be
18 convenient for everybody to simply add these people in, and
19 treat them as if they were subject to Judge Rakoff's order
20 going forward.

21 THE COURT: Is that on the theory that I wouldn't
22 reach a different conclusion than Judge Rakoff?

23 MR. LACY: I'm sorry?

24 THE COURT: Is that on the theory that I wouldn't
25 reach a different conclusion than Judge Rakoff with respect

1 to those proceedings that were not barred of the
2 consolidated briefing? You're essentially saying it's
3 binding precedent, even if they weren't parties.

4 MR. LACY: It seems to me it's binding precedent,
5 we've got a decision in 74 cases in this bankruptcy
6 proceeding.

7 THE COURT: I'm not suggesting I would reach a
8 different opinion than Judge Rakoff.

9 MR. LACY: And they're all going to go back to
10 Judge Rakoff.

11 THE COURT: Well.

12 MR. LACY: All right. The final thing I'd like to
13 say is that insofar as the trustee's motion is asking for
14 discovery concerning good faith, it is not fair to the vast
15 majority of the defendants who have *prima facie* good motions
16 to dismiss on extraterritoriality, to subject them to that
17 exercise.

18 The trustee waited for about four months before
19 making that motion. The good faith decision came down in
20 April. The trustee waited until the end of August to make
21 that motion. There can't be any urgency about it, so we
22 would submit that the heart of the trustee's motion that is
23 addressed to good faith issues, both the request for
24 discovery and the request to amend just be deferred until we
25 get past the extraterritoriality issue.

Page 17

1 There's one little procedural item I'd just like
2 to tag at the end. The trustee has taken the position that
3 the motions before Judge Rakoff did not suspend the time for
4 people to answer under Rule 12. It seems to me that that's
5 wrong, but, in fact, there is a pleura of e-mails and
6 telephone calls every couple of months, in which people get
7 new stipulations from the trustee extending their time to
8 answer. And I would like to propose that the defendants
9 that are subject to this consolidated motion not have to
10 answer until the motion is decided, which is the way I read
11 12.

12 Any questions, Your Honor?

13 THE COURT: No. Let me hear from the trustee.

14 MS. GRIFFIN: Good afternoon, Your Honor, Regina
15 Griffin, Baker Hostetler, counsel for the trustee.

16 Your Honor, I'm going to refrain from arguing our
17 motion, and that's why we're not here. Obviously the
18 trustee and counsel for the defendants have different views
19 of how Judge Rakoff's decision, how final it is, and how
20 dispositive it is.

21 THE COURT: I guess it's interlocutory because you
22 haven't appealed it, right?

23 MS. GRIFFIN: That's correct, Your Honor. It
24 certainly -- it expressly directs the case back to Your
25 Honor for disposition pursuant to the guidance that is

1 contained in it, but it's the trustee's position that the
2 guidance contained in there, while it may contain rulings
3 about what constitutes a foreign transfer, it certainly
4 doesn't definitively say that what in addition to a foreign
5 transferor and a foreign transferee might be sufficient to
6 allege a domestic transfer.

7 And, Your Honor, there are many, many facts, many
8 of which are in the complaints, many of which are not,
9 because those complaints were filed such a long time ago
10 before these standards were changed, and now these new facts
11 have become relevant that would, I think, be pertinent.

12 And, you know, certainly Mr. Lacy's chart about
13 where the parties may be located might be partially
14 accurate, but there are things such as the fact that there
15 are transferors such as Fairfield that are residents in two
16 places, they may be in the BVI as a matter of where they
17 were formed. But their principal place of business was here
18 in New York. That is something that we think there are many
19 facts that you may want to take into consideration about
20 whether or not Fairfield is considered a foreign transferor.

21 There are situations where they are registered to
22 do business here. There are subsequent transferees who are
23 also resident here. Parties can be in more than one place.
24 There are bank accounts, not correspondent bank accounts,
25 which Judge Rakoff did find would not be enough to make a

Page 19

1 foreign transferor more than -- anything more than foreign.
2 But there are defendants who executed subscription
3 agreements who agreed to New York jurisdiction, to New York
4 choice of law.

5 There are situations where defendants have filed
6 proofs of claim. There are parties who actually solicited
7 counsel in the U.S. about whether or not U.S. Bankruptcy
8 Code and SIPA would provide coverage. And these are facts,
9 Your Honor, that obviously it's about a futility argument,
10 it's about -- I agree with counsel that we definitely
11 disagree.

12 It's how we proceed hereon for efficiencies
13 purpose.

14 THE COURT: I haven't. Let me interrupt you. I
15 haven't looked at the motion for leave to amend, but I'm
16 being told that you didn't attach proposed amended
17 complaints to that motion.

18 MS. GRIFFIN: We didn't, Your Honor. It's --

19 THE COURT: I don't know how I would decide it
20 though.

21 MS. GRIFFIN: Pardon me?

22 THE COURT: How would I decide the issue of
23 futility if I couldn't see the allegations?

24 MS. GRIFFIN: Your Honor, we're trying to do it on
25 the basis of efficiency, and the fact that the one common

Page 20

1 factor that exists across all of these cases is that the law
2 has changed, and that the -- in many instances, the trustee
3 still has the lead to replead as a matter of right.

4 And so we were merely trying to get in front of --
5 there's going to be chaos in a situation where you have so
6 many cases, so many defendants, and so many different
7 issues. And what we're trying to do is start a dialogue
8 about how we can proceed on all of these very fact intensive
9 and fact specific inquiries.

10 In a situation where the defendants are looking at
11 it from the prism of only the extraterritoriality issue,
12 what's in front of the Court are cases that deal with the
13 good faith issue, they deal with the extraterritorial issue,
14 many of them overlap, and others deal with personal
15 jurisdiction issues. But what they all share in common is
16 the procedural state that we're in.

17 The reason, Your Honor, we had -- we were prepared
18 to file the motion earlier with regard to the good faith
19 proceeding, but then the extraterritoriality decision came
20 down. And we are merely trying to reach a place, Your Honor
21 -- I'm sorry, I'm not sure if the Court can still hear me.

22 THE COURT: I can hear you, but I still come back
23 to the question, how do I decide your motion if I don't see
24 a proposed amended complaint. Because I assume whatever
25 you're going to allege they're going to argue it's

1 foreclosed by Judge Rakoff's decision.

2 MS. GRIFFIN: It may, Your Honor, but what we were
3 hoping to do is to allege -- is to amend all at once.

4 THE COURT: Why don't you amend one complaint, and
5 put that up for the motion, and then they can argue whether
6 or not it's futile.

7 MS. GRIFFIN: Are we limiting it to just an
8 extraterritoriality issue, Your Honor? Because in every
9 case --

10 THE COURT: Well, I haven't seen your motion --

11 MS. GRIFFIN: Okay.

12 THE COURT: -- so I'm not deciding it. All I'm
13 saying is, if you haven't provided a proposed amended
14 complaint, I don't know how I can decide your motion.

15 MS. GRIFFIN: Because, Your Honor, the fact is, is
16 that every case is different, and because of the fact
17 intensive nature about what each case involves, it's -- we
18 would have to do that in every case. And we can proceed
19 that way, and we're happy to do that, Your Honor. We were
20 simply trying to find a way that we could be efficient, and
21 do this in a way where the parties making motions aimed at
22 complaints that didn't have all the facts in them, that's
23 really what we were trying to accomplish.

24 THE COURT: I understand that. I still come back
25 to the problem I have with the way you're proceeding. I

Page 22

1 understand the burden, but I don't know what else to say.

2 MS. GRIFFIN: Okay.

3 THE COURT: Except to pick a representative case
4 and try that.

5 MS. GRIFFIN: It's --

6 THE COURT: I recognize the facts and
7 circumstances are different --

8 MS. GRIFFIN: Each --

9 THE COURT: -- but you have, I guess, a lot of
10 cases with Fairfield --

11 MS. GRIFFIN: Yes, Your Honor. The -- well, Your
12 Honor, what's going to happen is, is either -- when you get
13 into this issue deeper, and you read the recent decisions
14 that come out of the Second Circuit, Park Central being one
15 of them, you'll see that every subsequent transferee may
16 have different circumstances. Fairfield may be the same, as
17 the transferor that's involved, but then there are going to
18 be subsequent transferees who may have filed a proof of
19 claim. They may be resident here in a branch office on Main
20 Street.

21 So taking for us, and each time you rule, you're
22 going to be charting a new territory, factors that may or
23 may not be.

24 THE COURT: But how do I deal with the argument
25 that the amendment is futile, if I can't see the amendment?

Page 23

1 MS. GRIFFIN: I guess, Your Honor, that it's a
2 very good point, we have to, I guess, in each case present
3 to you -- what we were trying to do though is amend as to
4 every issue. So if you want us to put forward, perhaps we -
5 -

6 THE COURT: I don't want you to do anything.

7 MS. GRIFFIN: Sure.

8 THE COURT: All I'm telling you is, you've made a
9 motion for leave to amend, which is not before me today, I
10 don't have the complaints, one of the arguments that can be
11 made in opposition to the motion, and they're clearly
12 opposing the motion, is that the amendment is futile, and I
13 don't know I decide that.

14 MS. GRIFFIN: Your Honor, perhaps what we can do
15 is on a case-by-case basis then put forward facts in our
16 opposition that we would put into an amended complaint.

17 THE COURT: Why don't you just put them into an
18 amended complaint.

19 MS. GRIFFIN: We can do that, too, Your Honor.

20 THE COURT: Okay.

21 MS. GRIFFIN: We can. Again, it's an efficiency
22 basis. Do we also amend all at once to deal with the good
23 faith issue, that's the complicating issue. And there are
24 people who raise personal jurisdictional issues. Are we
25 really just going to brief the extraterritoriality issue on

1 futility first, and not deal with --

2 THE COURT: Well, what is your motion to amend
3 directed at?

4 MS. GRIFFIN: It was directed at giving us leave
5 to replead in light of the change in standards, and it also
6 sought discovery, and a certain number of identified cases
7 where the trustee had received no documents whatsoever.

8 MR. LACY: Your Honor, I think Ms. Griffin and I
9 actually got to an agreement there a moment ago. She said,
10 we can say in response to the motion what we would allege in
11 each particular complaint.

12 It is correct that there is no representative
13 complaint that could be amended. There is no representative
14 amended complaint. The circumstances are different for each
15 complaint. The only way to proceed is for them to tell us
16 at some point how they would amend with respect to each
17 complaint.

18 But the normal procedure for doing that, and
19 surely the fastest way to get through this, is to do that as
20 part of their opposition to the ongoing motion to dismiss.
21 That way, they will have had our views concerning what Judge
22 Rakoff's decision means, they won't be shooting in the dark.
23 They will have every opportunity to be proposing amendments
24 that will undercut our arguments. They'll know just what
25 we're after, just as anyone else would be in this position,

Page 25

1 trying to amend out of a motion to dismiss. Then we --

2 THE COURT: So let me understand, you're proposing
3 to make a motion to dismiss the complaints?

4 MR. LACY: There is a motion to dismiss. We're
5 proposing to continue the existing motion to dismiss by
6 supplementing it with a chart, which we'll try to agree on
7 as much as possible, and a ten paged brief, and we propose
8 that they respond to that with what is likely to be a fairly
9 long opposition.

10 THE COURT: Basically a kind of a chart where they
11 list the facts that they would allege.

12 MR. LACY: That would be -- if they can get it
13 into a chart, it'd be wonderful for all of us.

14 THE COURT: Uh-huh.

15 MR. LACY: I -- the rule concerning specificity in
16 amending complaints, some judges say you've got to give me a
17 blackline in the complaint, but others say just tell me
18 precisely what you're going to change. It seems to me that
19 the second is just as good of way of doing it. If they want
20 to give it to us as a chart, that would be fine, and then we
21 will put in a reply paper where we will say with respect to
22 each of the, whatever 74 proceedings, this is going -- this
23 is true. Or we might concede on one or two that it's not.

24 Your Honor, finally just to make clear, they are
25 not asking for any discovery with respect to

1 extraterritoriality. So there's no reason to go through the
2 issue --

3 THE COURT: I got that.

4 MR. LACY: -- before doing those amendments.

5 THE COURT: So, Ms. Griffin, what about the
6 procedure that's just been proposed?

7 MS. GRIFFIN: Your Honor --

8 THE COURT: They'll make a ten paged motion to
9 dismiss, and then you'll give me a chart explaining what
10 additional allegations with respect to each complaint, or
11 additional facts really I guess with respect to each
12 complaint would allege.

13 MS. GRIFFIN: We can do that, Your Honor, we can't
14 do it in a two week time period with respect to 74
15 complaints.

16 THE COURT: This case has been going on six years.

17 MS. GRIFFIN: Your Honor, regrettably the
18 timetable --

19 THE COURT: I'm not suggesting you're at fault,
20 but it's going on for six years, whether it takes two weeks
21 or four weeks, it really doesn't matter at this point.

22 MR. LACY: I was only proposing two weeks as a
23 time to try and work out the accuracy of this chart.

24 MS. GRIFFIN: Right.

25 MR. LACY: Then we would put in our brief, they

1 can then have a month or whatever they want to respond to
2 that.

3 MS. GRIFFIN: Your Honor, if I could propose,
4 we'll speak with Mr. Lacy again. This is part of the
5 dialogue to move forward as efficiently and as fairly as we
6 can under the circumstances.

7 THE COURT: Okay.

8 MS. GRIFFIN: So we can consult with Mr. Lacy,
9 talk about how we move forward, how the briefing would look
10 with the chart or facts would look like. We can do that.

11 THE COURT: All right. That sounds like it makes
12 the most sense. Is there anyone else who wants to be heard
13 in connection with this issue?

14 (No response)

15 THE COURT: The record should reflect there's no
16 response.

17 So the general framework is that the defendants in
18 the consolidated proceeding, and you didn't follow to the
19 suggestion to just combine the charts, but we can deal with
20 that separately. The defendants will make a short motion to
21 dismiss, and then you'll respond explaining what additional
22 extraterritoriality allegations you would make in the
23 complaint, in a chart form which is simple enough, where
24 just can be done narratively, as long as the separate
25 adversary proceedings (indiscernible).

1 MS. GRIFFIN: We will do our best, Your Honor.

2 MR. LACY: Your Honor, I do want to emphasize that
3 I think we should keep the existing motion going, so we
4 don't have to go through this exercise of writing a new
5 order that saying, that moving on extraterritoriality is not
6 going to foreclose people for making motions to dismiss
7 based on other grounds.

8 THE COURT: Any objection to that?

9 MS. GRIFFIN: No, Your Honor. I guess what I need
10 to understand from Mr. Lacy is what motion to dismiss do you
11 consider is still open, is it just the extraterritoriality,
12 is it the good faith, I guess I want to know what we're
13 dealing with.

14 THE COURT: Are these -- is this good faith issue
15 for the subsequent transferees under 550?

16 MS. GRIFFIN: You know what, Your Honor, I don't
17 waste the time doing semantics. We can work it out between
18 ourselves. It's -- I'm hearing things about what they're
19 considering still be open for the first time. And so when -
20 - if we're dealing with just extraterritoriality, we're
21 going to be coming back again and again and that's one of
22 our efficiency concerns. But I think this is something we
23 can probably work out with counsel.

24 THE COURT: All right. What do you propose we do
25 today in terms of the conference? When is your motion to

Page 29

1 amend the complaint scheduled for?

2 MS. GRIFFIN: It is scheduled -- I think counsel's
3 opposition is due on October 10th. The hearing was on the
4 22nd.

5 THE COURT: Of October?

6 MS. GRIFFIN: Yes.

7 THE COURT: Any objection to just adjourning this
8 conference to October 22nd?

9 MR. LACY: Well, could we adjourn that motion as
10 well, please?

11 MS. GRIFFIN: I think that makes sense, Your
12 Honor, we're going to need time.

13 THE COURT: All right. How long an adjournment do
14 you think makes sense in terms of adjourning all these
15 matters?

16 MR. LACY: Well, I'm sure we can talk -- we can
17 get talking done by the 22nd of October.

18 THE COURT: Do you want to speak and then write a
19 letter to the Court and post it on the docket when you think
20 it makes sense to be --

21 MS. GRIFFIN: Yes, Your Honor.

22 THE COURT: -- adjourned?

23 Okay. Why don't we do that. Thank you.

24 We'll take a brief recess and then we'll start the
25 2 o'clock calendar.

1 (Recessed at 1:57 p.m.; reconvened at 2:22 p.m.)

2 THE CLERK: All rise.

3 THE COURT: Please be seated. I apologize for the
4 delay, but we had some communication problem with the
5 overflow room.

6 All right.

7 MR. CREMONA: Your Honor, if I may, Nick Cremona
8 on behalf of Irving Picard as --

9 THE COURT: You didn't stand up fast enough, Mr.
10 Levy.

11 MR. CREMONA: -- trustee. I wanted to raise a
12 threshold matter with Your Honor before we got started.

13 THE COURT: Yes.

14 MR. CREMONA: Just to be clear, I received an e-
15 mail from Mr. Kirby on behalf of the interveners at 11:24
16 today, and they indicated that they wanted to be heard on
17 these proceedings. To my knowledge, that -- their motion
18 for intervention has not been granted by Your Honor.

19 THE COURT: That is correct.

20 MR. CREMONA: We renew and maintain our objection
21 to having them be heard, given the fact that they're not
22 joined to these proceedings and their cases are not appended
23 to the notices of hearing for today. But I, of course,
24 defer to Your Honor.

25 THE COURT: All right. Mr. Levy.

1 MR. LEVY: Thank you.

2 THE COURT: Let me just ask you, how you intend to
3 proceed. You're going to argue a specific issue.

4 MR. LEVY: Yes, Your Honor, the defendants are
5 going to split up the argument among various different
6 issues.

7 THE COURT: Have you discussed with the trustee
8 whether it makes sense for the defendants to make all of the
9 arguments, and have the trustee respond or do it argument-
10 by-argument?

11 MR. LEVY: We have not had that conversation, Your
12 Honor.

13 THE COURT: So what do you think makes sense?

14 MR. LEVY: I'm getting a signal from our side,
15 Your Honor, that that suggestion is, is that we do
16 particular issues separately. The problem that I'm going to
17 suggest to Your Honor is that the issues I'm going to
18 address at the beginning actually have considerable overlap,
19 but may make sense for obligations in the antecedent debt to
20 be considered as a package.

21 THE COURT: Would that modification, do you have
22 any objection to that procedure?

23 MR. CREMONA: I apologize, can you repeat that?

24 MR. LEVY: The argument that I'm going to present
25 on the two points allocated to me, obligations and the

1 antecedent debt have a certain amount of overlap to the
2 argument I'm going to make. My suggestion is that we treat
3 them as a package.

4 MR. CREMONA: I had intended to do the same.

5 THE COURT: And then -- okay. So they'll argue
6 their issue or their overlapping issues, then you'll
7 respond, then we'll move on to another issue --

8 MR. CREMONA: Sure.

9 THE COURT: -- we'll just be -- go ahead.

10 MR. LEVY: One other housekeeping matter, Your
11 Honor. On the particular arguments that may be made, I
12 understand that several of my colleagues may have
13 supplemental points to make in addition to what I present to
14 the Court this afternoon. So when I finish my presentation,
15 I will yield to them.

16 THE COURT: As long as they're telling me
17 something that you don't tell me.

18 MR. LEVY: Good afternoon, Your Honor, may it
19 please the Court, Richard Levy of Pryor Cashman on behalf of
20 the defendants. My firm represents 11 actions, which have
21 motions pending before Your Honor today. I make arguments
22 that are also common to a good number of the cases that are
23 before Your Honor this afternoon.

24 And, in particular, I'm going to deal with the
25 question of whether or not SIPA allows the trustee to reach

1 the avoidance of obligations, whether obligations provide a
2 defense under Section 548, and whether there is an
3 antecedent debt defense that Your Honor should be
4 considering.

5 Some of these motions have been pending since as
6 early the spring of 2013. These were cases that first came
7 down from Judge Rakoff, after having been considered on
8 withdrawal of the reference. Motions were then made, and a
9 good number of those 85 cases that comprised the decision in
10 Greiff. Other defendants have since made additional
11 arguments and made additional motions, all of which are
12 before the Court today.

13 The defendants that I represent are the targets of
14 amended complaints that were filed by the trustee during the
15 proceedings before Judge Rakoff. The complaint as
16 originally filed asserted that my client or clients as
17 customers of Madoff or subsequent transferees of customers
18 received transfers constituting, in the trustee's parlance,
19 profits, excess over principal, something to which they were
20 not entitled, and which was recoverable under the SIPA
21 statute. They did not in the original complaint assert any
22 argument based on obligations.

23 While we were before Judge Rakoff, the question
24 came up by way of the trustee's amendment of the complaints
25 to assert that there were, in fact, avoidance arguments to

1 be presented by the trustee to avoid obligations.

2 Unfortunately, most of those obligations are not specified
3 in the complaint so we have a pleading issue, but
4 nevertheless, the legal issue was presented.

5 Judge Rakoff didn't decide the obligations
6 (indiscernible). We made oral argument to him in the spring
7 of two thousand -- in January of 2012 to February of 2012.
8 He never reached the issue, and in a decision recently made
9 by Judge Rakoff, I think in the Most (ph) case, the Court
10 indicated that the obligations argument was not to be
11 decided by him, was rather going to be referred to Your
12 Honor for decision, which makes it ripe for decision today.

13 So I'm going to lead off and deal with the
14 obligations and antecedent debt arguments. As I'm going to
15 discuss, obligations has not yet been decided by any -- the
16 avoidability of obligations in the context of this SIPA
17 proceeding has not been decided by any other court, who has
18 yet heard argument in the case.

19 As to the antecedent debt issue, it's my intention
20 to address some important developments in the law, that bear
21 upon these motions since the time of their filing.

22 THE COURT: Can I ask you a question?

23 MR. LEVY: Yes, Your Honor.

24 THE COURT: On the antecedent debt issue which
25 Judge Rakoff did decide --

1 MR. LEVY: Yes. He decided it in two pieces, and
2 for two distinctly different groups of customers.

3 THE COURT: Okay. But essentially as I understand
4 it, he decided that you couldn't allege the satisfaction of
5 estate or federal securities fraud claim constituted value
6 for the purposes of Section 548-6.

7 MR. LEVY: That is one way to frame it, Your
8 Honor. The way I would frame it is that he held that the
9 customers may well have claims under those laws, but that
10 they don't rise to the level of an antecedent debt --

11 THE COURT: Okay.

12 MR. LEVY: -- by reason of value or some --

13 THE COURT: Do you represent any clients who are
14 parties to that decision?

15 MR. LEVY: Yes, Your Honor, I do.

16 THE COURT: Judge Rakoff withdrew the reference of
17 that issue. Do I have any authority to consider that issue,
18 at least as to the clients that were parties to the decision
19 before Judge Rakoff? He never referred it back to me.

20 MR. LEVY: I believe Your Honor does have the
21 ability to reconsider, revisit which whatever objective you
22 wish to use --

23 THE COURT: What's my jurisdiction though if he
24 withdrew the reference?

25 MR. LEVY: But he no longer has the reference.

1 THE COURT: But he didn't send -- he sent me back
2 -- sent back the cases to administer in accordance with his
3 decision, but he never referred the issue back to me.

4 MR. LEVY: I think on obligations he did, number
5 one --

6 THE COURT: Well, obligations I understand.

7 MR. LEVY: On the antecedent debt, there were
8 other defendants who have made the motions, I'm making the
9 argument, in effect, on their behalf this morning -- this
10 afternoon.

11 THE COURT: I understand the defendants who were
12 not parties to that, I'm not sure who they are, but I
13 understand the argument, and as to them, the question is
14 whether that is binding or persuasive authority, or at least
15 persuasive authority in those cases.

16 But as to those defendants that were parties to
17 that, just seems to me I don't even have jurisdiction to
18 consider that issue.

19 MR. LEVY: I think Your Honor has -- I think the
20 way the law reads, the way I interpret the law, is Your
21 Honor is obligated certainly to pay considerable weight to
22 the precedent decision by Judge Rakoff. It hasn't been
23 considered by an appellate court, so I don't even know that
24 it's law of the case.

25 There are --

1 THE COURT: Even in the cases he decided that were
2 parties to the withdrawal of the reference?

3 MR. LEVY: Perhaps to that extent, Your Honor, but
4 not to the extent of binding the entire universe of
5 defendants, number one.

6 Number two, I think by reason of the change in
7 circumstances and the applicable law, Your Honor sitting as
8 in effect the bankruptcy --

9 THE COURT: The appellate court to Judge Rakoff
10 now?

11 MR. LEVY: I wouldn't frame it that way, Your
12 Honor. But sitting as the exercise -- the Court exercising
13 the bankruptcy jurisdiction, the bankruptcy power, which is
14 what Judge Rakoff effectively was deciding, when he had --
15 exercising when he took the cases upstairs.

16 You're in a position now as if that -- the
17 bankruptcy decision had been rendered at the first level.
18 Your Honor has the ability -- the Court has the ability
19 certainly to revisit prior decisions made in the case.

20 In addition, Your Honor, the change in
21 circumstances and change in applicable law, we believe are
22 circumstances that warrant Your Honor seriously considering
23 whether or not the prior decision has any continuing
24 vitality, and that's the point I'm going to make not only
25 for my clients, but certainly for the clients who are not

1 parties to those -- to the earlier decisions by Judge
2 Rakoff, either on the statutory obligations issue, the
3 statutory rights issue, the contract issue, or the tort
4 claims.

5 THE COURT: Okay. Go ahead.

6 MR. LEVY: But, Your Honor, after I'm done,
7 obviously Mr. Kupillas is going to follow with a variety of
8 arguments that he's responsible for, Ms. Neville, they'll
9 both supplement my comments as well.

10 The other point I want to make, Your Honor, as a
11 predicate, these are cases all that are -- involve
12 defendants who are innocents or good faiths. There is no
13 allegation of any bad faith or culpability on the part of
14 any of these defendants. That's particularly important as
15 we'll see in a little bit when we talk about the state law
16 adherence -- the state law elements of the defenses, the
17 debts, the claims that are available to our clients, and the
18 fact that one has to look at the good faith of the client
19 that's not in doubt, in determining whether or not --

20 THE COURT: It's a value issue, it's not a good
21 faith issue, in terms of talking about the defense.

22 MR. LEVY: I understand that, Your Honor, but I
23 want to make clear that we are dealing with parties who are
24 not alleged to have engaged in any wrongdoing.

25 THE COURT: I understand.

1 MR. LEVY: That does become important, for
2 example, in considering whether public policy considerations
3 can supervene what the language of the statutes is.

4 So, Your Honor, turning to the specific questions
5 of obligations and the antecedent debt, there are some
6 common threads as you'll see.

7 I don't intend to spend any time on the basics of
8 the antecedent debt argument. I think Your Honor
9 understands well the parameters of the 548(c) defense. I
10 want to concentrate on first, the statutory issue involving
11 obligations, and the, what we believe to be the significant
12 change in the law on antecedent debt.

13 So I explained to Your Honor how obligations came
14 to be involved in these cases. It's still here to the
15 extent that it's been asserted in amended complaints against
16 my clients, amended complaints against other clients, which
17 have not yet been addressed by any court.

18 The question that first arises is does SIPA even
19 give Your Honor the obligation to entertain a claim to avoid
20 an obligation.

21 THE COURT: The obligation?

22 MR. LEVY: Excuse me?

23 THE COURT: Go ahead.

24 MR. LEVY: I'm sorry, Your Honor, I --

25 THE COURT: Go ahead. You used the word

1 obligation twice in that sentence.

2 MR. LEVY: I did. I'm sorry, Your Honor.

3 The first question is whether Your Honor even has
4 the ability to entertain a claim for the avoidance of
5 obligations under the SIPA statute.

6 THE COURT: But Mr. Piccard has all the powers of
7 a trustee.

8 MR. LEVY: That may be, Your Honor, but there's a
9 specific provision which overrides the general.

10 THE COURT: Isn't that -- I know what you're
11 talking about, but that's a provision that expands his
12 authority beyond what a trustee normally has. You're
13 talking about the provision that lets him recapture customer
14 property as if it was property of the estate?

15 MR. LEVY: Yes.

16 THE COURT: That grants him greater authority than
17 a trustee has, not lesser authority.

18 MR. LEVY: Your Honor, I would argue that that
19 provision actually modifies the power of the bankruptcy
20 trustee because it is --

21 THE COURT: Well, let me ask you --

22 MR. LEVY: -- the specific statute which overrides
23 the general.

24 THE COURT: -- suppose that Madoff Securities
25 fraudulent incurred an obligation, having nothing to do with

Page 41

1 customer property, just fraudulently incurred an obligation
2 that would be a general obligation of the estate. You're
3 telling me that the trustee would have no power under the
4 Bankruptcy Code to avoid that obligation?

5 MR. LEVY: I'm not suggesting that, Your Honor.
6 I'm suggesting with respect to the customers, there is no
7 ability to avoid obligations.

8 THE COURT: Okay. Well, what if they're not
9 obligations not in the capacity as customers, but in a
10 capacity as general unsecured creditors?

11 MR. LEVY: I'm not making that argument, Your
12 Honor. I don't have -- that's not an issue that involves my
13 clients at all. I'm dealing with the question of whether or
14 not a trustee can obtain from a customer, can avoid from a
15 customer an obligation owed to the customer, obligation
16 incurred to the customer.

17 THE COURT: Aren't these the same obligations,
18 though, that you're asserting in essence as a defense to the
19 transfer?

20 MR. LEVY: Yes, Your Honor, they are. We are
21 asserting that whether as matters of contract or statute, or
22 common law, there are either claims or chose as an action,
23 or rights to payment.

24 The statutes create statutory duties and
25 obligations. They create mandatory requirements that the

Page 42

1 broker has to adhere to. Those are obligations. They may
2 give rise to a right of payment, but they are obligations.

3 In Asia Global Crossing, Your Honor ruled that a
4 contract right, such as a guarantee creates a chosen action.
5 That creates a right to payment.

6 In the common law claim area, that creates a right
7 of action, which in turn leads to a right to payment, if
8 those claims are valid and exist. If the obligations exist
9 and are not avoidable, a payment on account of that
10 obligation is good value, is fair value and is not
11 avoidable. In the case --

12 THE COURT: Unless it's a Ponzi scheme, right?

13 MR. LEVY: Your Honor --

14 THE COURT: That's what the law is up until now.

15 MR. LEVY: The Ponzi scheme cases go in a
16 different direction. They say that we have to protect the
17 rights of the customers whose other money has -- whose own
18 money --

19 THE COURT: This rule isn't limited to SIPA cases.

20 MR. LEVY: Your Honor --

21 THE COURT: It's not limited to SIPA cases. It
22 usually comes up with a payment of interest, but the
23 underlying rationale is that you don't give value except to
24 the extent of the money you've deposited into the scheme.

25 MR. LEVY: I understand that, Your Honor. My

1 argument, Your Honor, is those cases are creating a public
2 policy argument that we have to reward the injured victims
3 whose money was left in. Judge Rakoff says, you can't use
4 an antecedent debt defense unless that antecedent debt would
5 be a customer claim.

6 The public policy arguments in the district and
7 circuit courts who say, we have to limit the recovery to
8 real value are not taking a hard look at whether or not the
9 antecedent debt defense measured from the customer
10 standpoint under applicable non-bankruptcy law, is valid.

11 So, for example, we don't use public policy to
12 limit tort claims. We use in pari delicto perhaps, but that
13 requires the defendant to have engaged in bad conduct.

14 We don't use public policy to invalidate contract
15 rights unless the party seeking to enforce the contract
16 engaged in illegal conduct. That's the law of the State of
17 New York on whether or not you can avoid a contract as being
18 contrary to public policy.

19 THE COURT: What's the relevance of New York
20 public policy to this case? We have victims from all over
21 the world and the country, and the issue is whether they
22 provide a value under 548(c) which is a federal statute.

23 MR. LEVY: I'm suggesting, Your Honor, as the
24 Court well knows, that the elements of a defense under the
25 antecedent debt or obligations provisions that we are

1 invoking here are defined by state law, non-bankruptcy law,
2 which establishes for example --

3 THE COURT: I understand --

4 MR. LEVY: -- the Article 8 rights.

5 THE COURT: I don't think -- I don't read Judge
6 Rakoff's decision to say you don't have claims. I read him
7 to say that in essence, you can't set off those claims
8 against the trustee's claim for customer property against
9 your client.

10 So you may well have claims and presumably every
11 investor has a fraud claim, certainly investors who have
12 lost have fraud claims. I'm not sure -- I don't know if
13 Matt Winters had, but -- so you have a fraud claim. But
14 Judge Rakoff said you can't set that off for the reasons he
15 said in his opinion.

16 MR. LEVY: And we think that's wrong, Your Honor.
17 We particularly think that the Fairfield Greenwich decision
18 rendered by the Second Circuit less than two months ago
19 makes that very clear.

20 THE COURT: But that case just dealt with what was
21 property of the estate, and said that SIPA didn't change
22 that. SIPA obviously changed the estate's right to acquire
23 or the trustee's ability to acquire customer property. So
24 there are changes in SIPA that do affect fraudulent transfer
25 actions, as you pointed out.

1 MR. LEVY: Your Honor, that decision -- I don't
2 think Your Honor can properly read that decision as simply
3 limited to what is property of the estate. That decision
4 makes clear that SIPA establishes a set of rules, it borrows
5 a bankruptcy avoidance statute, but it doesn't include any
6 language within that borrowing statute that says, oh, and by
7 the way, the 548 defense is limited to some basis -- a
8 comparison of priority as to what the claim would've been
9 now, and what the claim would be in the SIPA case.

10 THE COURT: Well, putting aside the priority
11 discussion in non-SIPA cases, Courts have ruled that in
12 Ponzi scheme cases, you don't give value beyond what you've
13 contributed to the scheme, for the purposes of a defense,
14 haven't they?

15 MR. LEVY: Yes, they have, Your Honor.

16 THE COURT: So those are non-SIPA decisions.

17 MR. LEVY: Yes, they are, Your Honor.

18 THE COURT: All right.

19 MR. LEVY: I'm saying that in the context of the
20 SIPA case, if you have a statute that doesn't -- you have a
21 statute which says nothing in SIPA, nothing in SIPA gives
22 the trustee some special power to completely disregard the
23 state laws.

24 And I'm suggesting that the state laws,
25 particularly those that affect the regulation of a broker

1 dealer in a highly regulated industry where obligations are
2 created is matters of statute.

3 The reason why obligations aren't recovered,
4 aren't recoverable from the customer is designed to protect
5 the customer's expectancy.

6 THE COURT: Are you talking about the branch of
7 your argument about avoiding obligations, or the branch of
8 your argument saying that the satisfaction of these
9 obligations is an antecedent debt?

10 MR. LEVY: Your Honor, I think there's a -- again,
11 as I said, there is an overlap, maybe a blur. The question
12 is whether or not obligations are avoidable, even if they're
13 not -- even if they may be subject to avoidance, they create
14 themselves a right to payment which protects the payments
15 that are made afterward.

16 THE COURT: But if they're avoided, or they're
17 avoidable, how can they protect the payment? Once you avoid
18 the obligation, you can recover the payment, can't you?

19 MR. LEVY: If they're avoidable. I'm suggesting
20 to Your Honor that the text of the statute doesn't provide
21 any claim for the trustee to recover obligations from
22 customers under Section --

23 THE COURT: Well, you don't recover obligations,
24 you just avoid them.

25 MR. LEVY: But it leads to the question whether or

1 not you can recover payments that ensue under or on account
2 of the obligation. So I'm suggesting to Your Honor that
3 Section 8(c)(3) of SIPA does not contemplate the allowance,
4 the avoidance of obligations.

5 In fact, the lack of any reference, any use of the
6 word obligation in that statute suggests that obligation
7 should be a defense.

8 THE COURT: But -- well, okay.

9 MR. LEVY: So, Your Honor, our point is, is that
10 Fairfield Greenwich has changed the playing field. We do
11 think that it is made very clear that the rules that Judge
12 Rakoff intended to impose here were not based on fair
13 reading of SIPA.

14 In addition, Your Honor, I think the language of
15 8(c)(3) has a clause in it that's important for us to keep
16 in mind, which seems not to have found its way into any of
17 the decisions.

18 The cases in front of Judge Rakoff and others have
19 focused on the provision in Section 8(c)(3) which says, and
20 I'm going to paraphrase, the trustee has the ability to
21 avoid a transfer of property to a customer, using the
22 fiction that it is not customer property, "to the extent
23 void or voidable under Title 11."

24 To the extent, that's the limitation, the
25 constraint on the trustee's remedy. But there's another

1 clause that follows the provision -- that particular
2 provision.

3 The end of the statute says, that a customer who
4 has received the transfer shall be deemed to have been a
5 creditor, the laws of any state notwithstanding.

6 That obviously is designed to confer upon the
7 creditor all of the rights and defenses that are available
8 in responding to a trustee. And I submit, Your Honor, that
9 that not only contemplates that the creditor/defendant has a
10 claim, but the fact that, for example, the statute doesn't
11 have any reference to the word obligations, there's no
12 reason why the creditor can invoke an obligation in full
13 defense and it's not avoidable, because there's no other
14 affirmative provision in 8(c)(3) that says the trustee can
15 go after the obligations.

16 Your Honor, I think we -- I'm not going to belabor
17 the point on Fairfield Greenwich. I think our letter of
18 February 4th amply makes out the point as to why the law has
19 changed. We also invoked in our briefs the recent decisions
20 by the Supreme Court that make very clear, and this is where
21 I have some problem frankly with the Ponzi scheme cases, and
22 I'll be very honest about that.

23 My problem with the Ponzi scheme cases is that the
24 Supreme Court says on the one hand, we take bankruptcy
25 statutes, codified statutes, we interpret them according to

1 their plain language. Then you have a decision like Janvy
2 (ph) released the other day, which the Court says, well, you
3 know, we have Ponzi schemes, we have to protect the innocent
4 victims whose money was left in at the expense of those who
5 dealt with the broker, or the Ponzi schemer in good faith,
6 and gave what they believe to be what was value, or gave
7 what was value, or received what was value, but we invoke a
8 public policy approach in order to protect them.

9 You know, I think Your Honor has seen that in
10 every actual fraudulent case, somebody's money is being
11 taken, somebody's expectations are being frustrated. This
12 is really no different from a garden variety actual fraud
13 case.

14 THE COURT: Well, except in all other cases, it's
15 the money of the estate, the general estate that's being
16 transferred. And here it's the money of individual --
17 really the property of individuals or investors, not
18 necessarily individuals.

19 MR. LEVY: But, Your Honor, the Ponzi scheme cases
20 all involve general estates as well. I don't think that
21 that distinction necessarily -- necessary carries all that
22 much weight.

23 The notion that we're going to allow public policy
24 to override the plain language of statutes is what I have a
25 problem with. I think the Janvy decision is a perfect

1 example of where a court went too far.

2 And the point I was making earlier about New York
3 State public policy and the role it plays in the antecedent
4 debt defense, if you have a contract claim based on your
5 dealings with the miscreant broker, who's absconded with
6 your money, given it to somebody else, leaving some people
7 completely at a loss, other people who have received some
8 money.

9 They had a contract. New York law says, that's a
10 contract that unless it's otherwise void against public
11 policy, we enforce. Now, where do you test the voidness for
12 public policy? Not from the standpoint of the innocent
13 customer who's seeking to assert his contractual rights to
14 recovery. It would only be set aside for -- as a void
15 against public policy unless Mr. Madoff was asserting it
16 against his customer.

17 The antecedent debt defense in this instance would
18 honor the contract in favor of the customer. Not a question
19 of public policy, rather a question -- not a question of
20 voiding for public policy, you don't void for -- I didn't
21 say that right.

22 THE COURT: But what about the public policy of
23 paying net equity claims to customers, which is clearly the
24 policy of SIPA?

25 MR. LEVY: They get whatever is in the customer

1 property pool that the trustee can recover quote, to the
2 extent avoidable under the Bankruptcy Code, close quote.
3 This is with respect to the avoidance remedy to be exercised
4 by the trustee. It is not an unlimited right.

5 Your Honor, may I have one moment? I may be done
6 with my --

7 THE COURT: Yes.

8 MR. LEVY: -- comments.

9 (Pause)

10 MR. LEVY: Your Honor, I'm going to yield to Ms.
11 Neville for a minute, and then I'm going to take the podium
12 just to sum up on the argument.

13 THE COURT: Okay.

14 MS. NEVILLE: Good afternoon, Your Honor --

15 THE COURT: Good afternoon.

16 MS. NEVILLE: -- Carole Neville from Dentons. I
17 have some of the 85 cases that were sent back to you without
18 a decision on antecedent debt. I think the three of us have
19 the 85 cases.

20 I wanted to point out that Judge Rakoff's decision
21 turns on the idea that the claims that we do have, which he
22 says are valid, don't rise to the same level as the customer
23 claim because there are cases, and one of them is Fitness
24 Holdings International, where a subordinated claim, this was
25 a claim of an insider, and at the time it was -- that's at

1 714 F.3d 1141.

2 THE COURT: Yeah, I read the case.

3 MS. NEVILLE: Yeah.

4 THE COURT: That dealt with constructive fraud
5 provisions and reasonably equivalent value under 528(a)(2),
6 which is not what we're talking about.

7 MS. NEVILLE: Well, no, but it does deal with
8 reasonably equivalent value and value, and basically what it
9 says, unless you had a recharacterization of the claim of
10 the insider to equity, it would've been a subordinated -- a
11 510 claim, and that would have been at least considered
12 value under state law.

13 The case is really about whether or not it's
14 recharacterization or equitable subordination. But my point
15 is that had it been a subordinated claim, it could have been
16 asserted as value. It's only if it was recharacterized as
17 equity that they would not consider it as reasonably
18 equivalent value.

19 So you have something that's really not on the
20 same priority, but the Code actually would allow an offset.
21 And you've raised at an early time what I was going to raise
22 later, which is this Ponzi scheme presumption.

23 I'm one of those people who have objected to the
24 label of Ponzi scheme by Madoff.

25 THE COURT: You don't think he was running a Ponzi

1 scheme?

2 MS. NEVILLE: No.

3 THE COURT: Okay.

4 MS. NEVILLE: You know, a mass -- not every fraud,
5 not every massive fraud is a Ponzi scheme. And I think -- I
6 lived through the Bayou (ph) case, where we actually managed
7 to convince Judge Harden that it wasn't a Ponzi scheme, it
8 was a fraud, but it wasn't a Ponzi scheme.

9 And the differences are they're not that enormous
10 on some of the presumptions, but what happens with the Ponzi
11 scheme label, is that a whole new area of what they call
12 Ponzi scheme jurisprudence which has no basis in the Code
13 gets swept in. And one of the things that happened is that
14 every defense, and every aspect of 548 is really basically
15 swept under the rug.

16 So I'm absolutely willing to admit this was a
17 massive fraud, it went on with 30 years with the Chairman of
18 NASDAQ providing over it, for 30 years, it didn't have any
19 of the classic criteria of a Ponzi scheme.

20 THE COURT: I thought he was paying old investors
21 with new investor money.

22 MS. NEVILLE: No, you could go in and out, I have
23 clients who were early investors who lost all their money,
24 and clients who were late investors, who came in and lost
25 everything. You could go in and out it wasn't --

1 THE COURT: But when you went out, you were paid,
2 right?

3 MS. NEVILLE: You were paid, but you could've been
4 paid with your own money.

5 THE COURT: And what would --

6 MS. NEVILLE: Because people went back in.

7 THE COURT: No, somebody else was paid with your
8 money, right?

9 MS. NEVILLE: Well, somebody else was paid with
10 your own money because people went in and out, they came in
11 and out of it. It was used as a bank account, as a
12 brokerage account, but not the kind of thing that you would
13 expect from a Ponzi scheme where really you --

14 THE COURT: So you're arguing that the trustee has
15 failed to allege a legally sufficient Ponzi scheme.

16 MS. NEVILLE: That's right.

17 THE COURT: Okay.

18 MS. NEVILLE: And I've seen this before, and we
19 argued in Bayou. What happens is, there's an allocution
20 which has some of the elements of a Ponzi scheme in it, the
21 poor defendant admits to them to some extent, and then all
22 of a sudden a label is there. And once the label is there,
23 every presumption comes out, and obviously the pleading --
24 the relaxed pleadings, some of those issues would be common
25 to an actual fraud as well, but not the entire juris

1 prudence on fraudulent conveyance.

2 So I'm asking you to just pull back a little bit
3 and listen to some of these defenses, which have been swept
4 under the rug and wiped away by the Ponzi scheme label.

5 THE COURT: Thank you.

6 MR. LEVY: Your Honor, I want to build on one
7 point that Ms. Neville just made, and that is in dealing
8 with Judge Rakoff's construction of an antecedent debt or
9 antecedent obligation, and the viability of that claim is
10 turning on its priority, the priority it would hold as to
11 whether or not it is a customer claim at some point in the
12 future.

13 I think that's flipping the whole concept of
14 subordination, the whole concept of equitable disallowance.
15 Those provisions would apply in the customer claim area, in
16 claims against the estate, and there are Code provisions
17 that say, a claim can be subordinated for equitable or
18 contractual reasons.

19 There's nothing in the juris prudence, there is
20 nothing in the case law, there is nothing in SIPA which says
21 that a 510(b) subordinated (indiscernible) concept applies
22 to the treatment of an avoidance claim, and the treatment of
23 a defense to the avoidance claim.

24 I think Your Honor should be cognizant of the
25 plain language of the statute in considering positions that

1 we assert today.

2 So, Your Honor, I suggest that the change in the
3 applicable law since Judge Rakoff's rulings gives you a
4 perfect basis under the Color Tile (ph) case to go ahead and
5 reconsider where we are, and consider whether or not the
6 defenses, as asserted in this motion are valid.

7 I suggest that the language of the statute
8 dictates that there is no avoidance obligation, there is no
9 obligation avoidance power in the trustee. A defense to
10 avoidance based on the satisfaction of obligations, chose as
11 an actions, pre-existing debts, whether arising under
12 contract, tort or statute are not constrained in the terms
13 of the 548(c) defense by the language of SIPA or by public
14 policy, because it is determined by the elements of the
15 governing state law at the time of the transfer, not as if
16 the claim had existed some years hence when a SIPA case was
17 commenced.

18 The defendant transferees' ability to raise those
19 defenses is predicated on obligations and the antecedent
20 debts themselves not limited by SIPA language or by any
21 priority scheme.

22 In light of the statutory caveat that needs to be
23 kept in mind, avoidance to the extent avoidable under Title
24 11 without any reference to any prioritization of claims,
25 that necessarily means that the Court has to consider the

Page 57

1 value defense in an entirely different light from that that
2 it was suggested by Judge Rakoff. And we believe the recent
3 jurisprudence under Fairfield and the dictates of the
4 Supreme Court for strict construction of codified bankruptcy
5 statutes requires that the obligations and debts at the time
6 of the transfer be deemed to give rise to a defense that
7 will defeat the trustee's avoidance claims.

8 I have nothing further, Your Honor, unless you
9 have any questions.

10 THE COURT: No. Let me just ask, before you stand
11 up, is there anyone else who wants to be heard on the issue
12 of obligations or antecedent debt?

13 MS. CHAITMAN: I do, Your Honor, just very
14 briefly, Helen Davis Chaitman of Becker and Poliakoff. I
15 represent the defendants in about 150 cases.

16 On the issue of whether this is a Ponzi scheme --

17 THE COURT: I -- in that issue as well I guess
18 since it was raised.

19 MS. CHAITMAN: Yeah, because I think it's
20 important. That's the basis on which Your Honor is
21 suggesting that the trustee's claims make sense.

22 BLMIS employed approximately 200 people. Of those
23 200 people, 188 were involved in what the trustee has always
24 claimed was a legitimate trading business. BLMIS was the
25 single largest trading operation in the world. For many

1 years, it did trades equal to ten percent of the daily
2 volume on the New York Stock Exchange. Its customers were
3 Bear Stearns, Fidelity, Schwab, the major financial
4 institutions.

5 The trustee has never suggested that those 188
6 people were involved in a Ponzi scheme. The trustee has
7 never sought to recover the payments that were made to the
8 customers who were the customers that the 188 people worked
9 with.

10 BLMIS the very same entity had 12 of 200 employees
11 who handled this fraudulent investment advisory business.
12 The trustee's own expert had admitted, Mr. Luby (ph) in the
13 certification he prepared with respect to the net equity
14 litigation. He has admitted that funds were intermingled,
15 that money from the investment advisory accounts was used to
16 purchase securities that were utilized in the trading
17 operations.

18 THE COURT: You know, you're really going outside
19 the four corners of the complaint. Remember, this is a
20 motion to dismiss. So tell me why the trustee hasn't
21 adequately pleaded that this is a Ponzi scheme, and entitled
22 to the Ponzi scheme presumption. You may ultimately be
23 right, I'm not saying you are or you aren't, but we're --
24 this is a motion to dismiss, and we're limited to the four
25 corners of the complaint plus the other documents I can

1 consider on a motion to dismiss.

2 MS. CHAITMAN: Right. I think, Your Honor, that
3 the law that has developed with respect to Ponzi schemes has
4 not been clearly thought out by a lot of the judges who have
5 issued decisions.

6 THE COURT: Including me.

7 MS. CHAITMAN: No, no, no, I'm not talking about
8 you at all. I'm sure you're going to do it right.

9 The -- if you look at the cases in my humble
10 opinion, the cases that are properly decided are cases that
11 label a Ponzi scheme a non-existent business where equity
12 investors have received a return and the trustee in
13 bankruptcy is entitled to recover the equity return because
14 there was no business.

15 THE COURT: So you're saying it doesn't apply to
16 debt for instance, debt schemes?

17 MS. CHAITMAN: I believe that it does not apply
18 when you have an operating business which is a legitimate
19 business as we do here.

20 THE COURT: But the Investment Advisory Act, the
21 business was not a legitimate business.

22 MS. CHAITMAN: Well --

23 THE COURT: And in any event, aren't we going
24 beyond the pleading is my point.

25 MS. CHAITMAN: No, because I think that the -- you

Page 60

1 could say that General Motors was a Ponzi scheme, because it
2 was living from hand to mouth and it needed to borrow money
3 in order to --

4 THE COURT: I hear you.

5 MS. CHAITMAN: Yeah.

6 THE COURT: All I'm saying is, and we're spending
7 time on this, this is a motion to dismiss a complaint, and
8 I'm limited to the allegations in the complaint. Just tell
9 me why the complaint does not allege that Madoff Securities
10 was not a Ponzi scheme. You're telling me additional facts
11 that aren't in the complaint but I -- can I consider those?

12 MS. CHAITMAN: My answer would be, Your Honor,
13 with respect to the SIPA liquidation that a SIPA liquidation
14 is a liquidation of a registered SEC regulated broker
15 dealer, who has real customers, runs a real business, and if
16 the man is a fraud and doesn't buy the securities that are
17 listed on the statements, it's still a real business, and it
18 doesn't come within a Ponzi scheme presumption.

19 THE COURT: All right. Okay.

20 MS. CHAITMAN: Thank you.

21 MS. NEVILLE: Your Honor, may I be heard on your
22 question about the motion to dismiss?

23 THE COURT: You know, if everybody keeps popping
24 up --

25 MS. NEVILLE: I know.

1 THE COURT: -- it's just not going to work. What
2 -- briefly, what is it?

3 MS. NEVILLE: On a motion to dismiss, you don't
4 take the facts as true if they're contradicted by the
5 record.

6 THE COURT: Well, I've looked at the allocution,
7 why isn't the allocution sufficient --

8 MS. NEVILLE: Because --

9 THE COURT: -- to survive or to prove a Ponzi
10 scheme?

11 MS. NEVILLE: Well, the Luby declaration is also
12 part of the complaint.

13 THE COURT: Who?

14 MS. NEVILLE: Luby, who was the trustee's
15 investigator. And that was -- the facts that Ms. Chaitman
16 was telling you that --

17 THE COURT: Well, if it's part of the complaint I
18 can consider it --

19 MS. NEVILLE: Yeah.

20 THE COURT: -- if it's attached to the complaint,
21 or referred to in the complaint.

22 MS. NEVILLE: It's referred to in the complaint.

23 THE COURT: All right.

24 MS. NEVILLE: And it's part of the record of the
25 case below, so her facts are admissible.

1 THE COURT: All right.

2 MR. CREMONA: Thank you, Your Honor, Nichole
3 Cremona, Baker and Hostetler on behalf of the trustee.

4 If I may, Your Honor, I'd like to just address two
5 things first, a threshold matter, just to put these matters
6 into procedural context before I get to the merits that many
7 of my colleagues just addressed.

8 I think despite being six years into this case,
9 Your Honor, and nearly four years into these adversary
10 proceedings, my colleagues that have gotten up here thus far
11 today are writing as if and arguing as if they're writing on
12 a clean slate. That's simply not the case, Your Honor.

13 There are multiple decisions within this action
14 that haven't been referenced. We're looking to other cases
15 that may or may not be relevant, but we're not looking at
16 the cases that are applicable and most particularly, the
17 Greiff case which the gang of fours I'll get into were a
18 party to, and as Your Honor pointed out, involved 84 cases.
19 And I would get to this -- I will get to this, that's
20 dispositive of the issues that it decided, and we can go
21 through those issues.

22 But, you know, I'd just like to say, Your Honor,
23 that you know, four years after the commencement of this
24 case, over three years after the net -- the Second Circuit
25 to net equity decision, and over two years after the

1 district court issued its decision in the Greiff cases is
2 what judges refer to, and almost a year after the antecedent
3 debt decision, we're still here today, Your Honor, talking
4 about whether these defendants can provide value to BLMIS
5 for the receipt of fictitious profits. That's the sole
6 issue in this case. And I would submit to Your Honor that
7 it's been decided multiple times already, but yet, here we
8 are four years into this case still arguing about it.

9 I just heard some of my colleagues bring up the
10 Ponzi presumption, and now we're in 2014, six years into
11 this case, and we're really still talking about whether
12 we've established the presumption that there's a Ponzi
13 scheme here on a motion to dismiss. It's very unfortunate,
14 in my view, that we're here doing that today.

15 And that's because I want -- I don't want to lose
16 sight of one thing. There are 780 innocent investor cases
17 pending right now by the trustee. The aggregate demand
18 amount in those cases is roughly \$3.2 billion. That's
19 unfortunate because that's \$3.2 billion that the defendants
20 in these cases are wrongfully withholding, and they're
21 wrongfully withholding it after being on notice, after six
22 years, that they got other people's money. And that's
23 tremendously unfortunate.

24 It's also unfortunate because as Ponzi schemes, as
25 Your Honor is well aware, every dollar that they retain is a

1 dollar that doesn't get the net loser victims here. It's
2 also unfortunate because by way of background, as Your Honor
3 is painfully aware, the trustee's recovery efforts have been
4 stalled and stymied through, I would -- over three years of
5 procedural litigation in the district court, which we would
6 all permit has been a procedural morass which has led to a
7 lot of confusion, which I hope to clarify here today,
8 especially with respect to the Greiff matter.

9 But after all of that, after all of the decisions
10 that have been issued, we're still talking about the only
11 issue in this case is whether fictitious profits can
12 constitute value within 548(c). Notwithstanding the fact
13 that it was first decided two and a half years ago in the
14 Greiff case, and then it was decided again by the district
15 court. And relying heavily on the Greiff case, which
16 impacts and dispositive of 84 cases that these movants are
17 arguing about.

18 So, I mean, I would just say, you know,
19 dissatisfied with the results in the Greiff and antecedent
20 case, these movants continue to recast, rename, reassert
21 value arguments, and you know, no matter how many different
22 ways they phrase the question and raise the issue, the
23 answer is still a resounding no.

24 You cannot get -- you cannot give value for
25 fictitious profits in a Ponzi scheme case. And I think as

Page 65

1 Your Honor recently noted, the law here has changed quite a
2 bit and is somewhat crystallized on this issue. When we
3 were down here a month or so ago on the Doris Igoin (ph)
4 matter, Your Honor noted another innocent investor case,
5 Your Honor asked defense counsel, this is a fictitious
6 profits case, what defenses are there. It's a strict
7 liability case.

8 I mean, that's what these cases are, Your Honor.
9 There are no other issues, no matter how we try to dress
10 them up, that is the issue. And I would say that these --
11 that issue has been completely disposed of by Greiff and
12 again by antecedent debt. And we -- all of these issues
13 have been informed by the net equity decision which came
14 down over three years ago.

15 We have all these guiding principles in this case,
16 and yet we're looking to an injunction case that has no
17 relevance whatsoever. I just -- I find that very
18 unfortunate.

19 But before getting to the antecedent debt issue,
20 Your Honor, I wanted to get to the procedural matter. As
21 Your Honor pointed out, just to be clear, you had Mr. Levy
22 who represented Goldman in Greiff, the Gang of Four, so to
23 speak, it's Pryor Cashman represented Goldman, Ms. Neville
24 represented Hyme (ph), Ms. Chaitman represented Greiff, and
25 Mr. Kupillas represented --

1 UNIDENTIFIED: Bloomenthal.

2 MR. CREMONA: -- Bloomenthal. Those are the four
3 cases that were the lead cases in the Greiff decision.
4 Those -- these firms then joined every one of their other
5 cases that they had clients in, and then we -- that Greiff
6 decision was dispositive of all 84 cases.

7 And as Your Honor pointed out, the district court
8 withdrew discreet issues and decided them and then sent the
9 balance of the case back, okay. Let's be clear on what
10 Greiff decided, okay. The -- and I can quote from Greiff,
11 "That those transfers from Madoff Securities to defendants
12 that exceed defendant's principal, i.e., fictitious profits,
13 were not for value within the meaning of 548(c)."

14 That was issued in April of 2012, and counsel is
15 here today arguing about antecedent debt, and whether or not
16 fictitious profits can constitute value. I submit, Your
17 Honor, that they are bound by that decision, and they should
18 be precluded from raising any further arguments, because
19 that case is binding on this.

20 And also in that case, we just talked about
21 whether or not the obligations issue was decided, and in
22 Greiff, or excuse me, in antecedent debt, Judge Rakoff said
23 in footnote 4, "similarly, the Court rejects defendants'
24 contention that Madoff Securities pre-reach back period
25 account statements constitute binding obligations of Madoff

1 Securities to its customers that the trustee must avoid."

2 This argument was effectively rejected in Greiff,
3 where the Court found that account statements were not
4 merely avoidable, but were, in fact, invalid and thus
5 entirely unenforceable.

6 THE COURT: Other than the obligations which may
7 arise from the account statement, are there any other
8 obligations you're trying to avoid?

9 MR. CREMONA: I think that's right, Your Honor, I
10 mean --

11 THE COURT: No, I'm asking you. Because when I
12 read the complaints I didn't know what you were talking
13 about.

14 MR. CREMONA: Well, I think it's the obligation as
15 I understand it, the point is almost moot.

16 THE COURT: Well, for example, if they have an --
17 if they have a claim based on fraud, are you trying to
18 invalidate that?

19 MR. CREMONA: We would, yes, Your Honor, and I
20 think there's an obligation that is within that -- that
21 arose within the two year period, but --

22 THE COURT: If they're going to attack the
23 obligations, this is an actual fraudulent obligation case,
24 just as it's an actual fraudulent transfer case, and the
25 complaints I looked at didn't identify the obligations

1 you're trying to avoid.

2 MR. CREMONA: We generally identified the
3 obligations that could arise within a two year period. I
4 agree, Your Honor, that we would -- those -- I guess let me
5 put it this way, the only obligations that could arise would
6 arise from those fictitious account statements.

7 THE COURT: Well, what about the fraud, the fraud
8 claim? Those people who got all their money back may not be
9 damaged --

10 MR. CREMONA: Uh-huh.

11 THE COURT: -- but it's arguably an obligation.

12 MR. CREMONA: It would be an obligation --

13 THE COURT: Of Madoff Securities. They were
14 defrauded.

15 MR. CREMONA: Assuming they assert a claim.

16 THE COURT: Well, they have asserted it. Well,
17 that's true. Okay.

18 MR. CREMONA: They haven't asserted a claim so I --
19 -

20 THE COURT: So why are you trying to avoid the
21 obligations if --

22 MR. CREMONA: We weren't trying to avoid the --

23 THE COURT: -- they haven't asserted a claim?

24 MR. CREMONA: -- obligation to the extent that the
25 fictitious account statement created an obligation, that's

1 what we're seeking to avoid.

2 THE COURT: Okay. But that's not clear from your
3 complaint. And there's a difference I think between having
4 an enforceable obligation under state or federal law and
5 having an avoidable obligation.

6 MR. CREMONA: I understand that, Your Honor, I --
7 the notion is that the -- well, I guess to put it
8 differently --

9 THE COURT: Why don't you move on to the argument
10 that whatever they have --

11 MR. CREMONA: Sure.

12 THE COURT: -- they can't assert it as value under
13 548(c), which is really what they're arguing.

14 MR. CREMONA: And that's my point, Your Honor. I
15 think it's almost moot -- well, it is, in fact, moot because
16 Judge Rakoff has already held in Greiff that these
17 fictitious and fraudulent account statements cannot give
18 rise either to an antecedent debt or an obligation.

19 So we maintain our account to avoid obligations,
20 but I don't believe based on what I just read to Your Honor
21 that a totally unenforceable and voidable account statements
22 give rise to any obligation on behalf of the debtor to these
23 defendants.

24 And just to move on then, I do think -- I would
25 close by saying I maintain that -- and oh, there's one other

1 issue, Your Honor, that was disposed of by Greiff. I
2 understand Ms. Neville is going to raise the Internal
3 Revenue Code issue, and whether or not mandatory withdrawals
4 from an IRA account can be avoided, as well as a New York
5 CPLR issue under Rule 5205.

6 THE COURT: That's a judgment enforcement issue,
7 though.

8 MR. CREMONA: I understand that.

9 THE COURT: That's an exemption from a judgment
10 enforcement, it has nothing to do with stating a claim.

11 MR. CREMONA: I agree, Your Honor.

12 THE COURT: All right.

13 MR. CREMONA: My point is only that that issue was
14 also disposed of by Greiff, it's referenced in footnote 13.
15 I mean, Your Honor, just to be clear --

16 THE COURT: Well, the argument is though, that
17 Judge Rakoff didn't focus on all of the language in the
18 statute which talked about additions which themselves were
19 fraudulent transfers under New York State law, and the
20 argument is, you don't have a New York State law claim here
21 at least, that's what their argument is.

22 MR. CREMONA: But, Your Honor -- okay, well then
23 that gets to what constitutes antecedent debt, and we can
24 get to that.

25 THE COURT: Well, my only point is that, that that

1 is a statute that relates to judgment enforcement, it has
2 nothing to do with stating a claim. There may be other
3 assets, for instance, but the --

4 MR. CREMONA: I understand.

5 THE COURT: We're a long way from there.

6 MR. CREMONA: What's that?

7 THE COURT: We're a long way from considering --

8 MR. CREMONA: I understand that. I guess just to
9 close the loop on the Internal Revenue issue, also Greiff
10 said, and I quote, "Having rejected the claim that Madoff
11 Securities owed to defendants, the profits it transferred to
12 them, the Court declines to conclude that Hein and
13 Bloomenthal (ph) may now keep their profits because they
14 feared that the Internal Revenue Code would deprive them of
15 half the benefit, to which they had no legal entitlement.

16 And that's where I was going with the next piece
17 of it. As Your Honor may have noticed in the Gen V v Brown
18 (ph) case, the end of that decision talked about a similar
19 provision under Texas law, and there was no such exemption
20 given because the defendant there, like the defendant here,
21 had no legal entitlement to the proceeds because they were
22 fraudulent. So that's just to close that thought, Your
23 Honor.

24 And I would submit that in those 84 cases, those
25 issues that I just described are binding on my colleagues,

1 and they should not be permitted to make any further
2 arguments because the cases were sent back by Greiff, and
3 the last paragraph in that decision says, "sent back to the
4 bankruptcy court to be adjudicated, consistent with my
5 ruling."

6 As Your Honor pointed out, whether you have
7 jurisdiction to reconsider that, I would submit that you
8 don't at this point. I think what they're doing here is an
9 improper reconsideration of the decision that was issued two
10 and a half years ago, and that was a threshold matter I
11 wanted to address.

12 To move forward, on antecedent debt, I disagree
13 with my colleague, Mr. Levy. I do think that in the first
14 instance the issue was decided in Greiff. I do think as I
15 pointed out, the issue of whether an obligation could arise
16 was also addressed in Greiff.

17 But I do want to focus a little bit on exactly
18 what Judge Rakoff said in his antecedent debt decision if
19 Your Honor would like, because I think it's somewhat
20 different than how it was phrased here.

21 All of the antecedent debt arguments that I heard
22 are predicated on false statements, and whether or not they
23 give rise to an antecedent debt, or whether or not the
24 defendant has a claim based on that false statement.

25 In order to enforce that frankly, they're asking

1 Your Honor to further the fraud and give credit to a
2 fraudulent statement. But putting that aside, Judge Rakoff
3 went through the analysis, he looked at 548(c) and whether
4 or not there was an antecedent debt. And then one would
5 look then to what constitutes an antecedent debt, the right
6 to a payment on a claim. And then you would say, well,
7 that's -- most often determined by state law, except where
8 there's a federal countervailing interest that prevails and
9 dictates otherwise, such as SIPA here.

10 And I think Judge Rakoff held that those claims
11 that Mr. Levy talked about 10(b)(5), Article 8, fraud
12 rescission, et cetera, breach of fiduciary duty, they can
13 never constitute value in this case, because we have to deal
14 with this case, not some other case, this case. And that
15 they can never, based on that ruling, because they -- the
16 definition of customer property is that which can be
17 determined based on looking at the debtor's books and
18 records.

19 And here, and Judge Rakoff said, those such claims
20 could never be valued, because one would never determine
21 them by looking at the debtor's books and records. So it's
22 quite clear. And in order to elevate that general unsecured
23 claim, which they may have, to a priority claim that
24 violates SIPA, and frankly it's contrary to the very notion
25 of bankruptcy would be akin to taking on a secured claim and

1 offsetting it against an administrative claim. It's very
2 similar, Your Honor, and I would submit -- I submit that
3 it's completely inappropriate, and complete contrary to
4 governing law in this case. And that's what we have to deal
5 with. We can't deal with some other case, we have to look
6 at the cases we have.

7 And I would submit that it's quite clear what can
8 and cannot constitute antecedent debt here. The issue has
9 been decided twice now for these folks, twice. And I think
10 that's enough.

11 I'm happy to move on to the Ponzi scheme
12 presumption issue.

13 THE COURT: Go ahead.

14 MR. CREMONA: I think it's, as Your Honor noted,
15 we are here on a motion to dismiss. We're entitled to
16 presumption. Our complaint's more than adequately detailed
17 of the fraud, you know, and although I don't want to go
18 beyond the pleadings as my colleague did, it's quite clear
19 based on the criminal prosecutions, we just had eight
20 additional people convicted --

21 THE COURT: I don't think I can consider that.

22 MR. CREMONA: I understand, Your Honor.

23 THE COURT: I can consider the allocution you
24 referred to in the complaint.

25 MR. CREMONA: Exactly. And it's referred to in

1 every complaint, and I think we more than adequately pled
2 and more than adequately entitled to the Ponzi presumption.

3 And I think it's also worth pointing out that at
4 every step of the way, every single decision I referenced,
5 it was specifically noted that this is the most notorious
6 Ponzi scheme in history. It's just worth pointing out.

7 THE COURT: Okay. Thank you.

8 MR. CREMONA: Thank you, Your Honor.

9 THE COURT: Anyone else want to be heard in reply?

10 Yes, sir? I'm sorry, SIPC, I'm sorry. You were
11 sitting behind the monitor, I couldn't see you.

12 MR. KELLY: Good afternoon, Your Honor, my name is
13 Nathaniel Kelly, I'm with the Securities Investor Protection
14 Corporation. I actually don't have much to add to Mr.
15 Cremona's arguments.

16 I just want to point out that the section of SIPA
17 that the defendants referenced, 78 FFF-2(c)(3), they
18 referenced a particular provision at the end, which says
19 that "customers will be treated as creditors for the
20 purposes of recovery."

21 I just want to point out that as the Fairfield
22 decision says, that's a legal fiction just to bring the
23 recovery actions within state law, that it doesn't modify
24 what constitutes value to the estate of customer property.

25 Also notably that defendants arguing -- to the

1 extent that the defendants are arguing that Fairfield
2 supersedes Judge Rakoff's decisions, Judge Fairfield (sic)
3 focused on that provision of 8(c)(3), Rakoff -- Judge Rakoff
4 never quoted it, never cited it, never relied upon it.

5 THE COURT: Thank you.

6 MR. KELLY: Thank you.

7 MR. LEVY: Your Honor, Mr. Cremona begins by
8 saying or predicates his position by saying that everything
9 has been decided, everything is final, there's nothing else
10 to decide, and it binds everybody who's represented in this
11 room today. We know that's not the case.

12 We know that --

13 THE COURT: Does it bind your clients?

14 MR. LEVY: Excuse me?

15 THE COURT: Does it bind your clients?

16 MR. LEVY: It bind my clients to the extent that
17 they were parties to the prior decision, and Your Honor is
18 obligated to grant considerable weight to the prior
19 decision. I don't believe it binds my clients to the extent
20 that supervening developments in the law change the
21 rationale of that decision, and whether or not it remains a
22 valid basis to invoke the --

23 THE COURT: I've heard that. I still --

24 MR. LEVY: -- trustee's remedies against my
25 clients.

1 THE COURT: -- have a question, a jurisdictional
2 question about my reconsidering a district court decision
3 after the district court has withdrawn the reference to
4 decide that issue.

5 MR. LEVY: The district court was sitting as a
6 bankruptcy court.

7 THE COURT: But it also withdrew the reference,
8 which to me means that I don't have jurisdiction. I agree
9 with you he was sitting as a bankruptcy court in the first
10 instance, but the district court could have withdrawn the
11 reference of the entire case, it would still be sitting as a
12 bankruptcy court, but I wouldn't have jurisdiction then.

13 MR. LEVY: Your Honor, we could ask the Court to
14 withdraw the reference. The Judge has sent obligations back
15 down to you, that's an issue you clearly have, and that's an
16 issue that clearly hasn't been decided.

17 For example, that plays into the antecedent
18 defense, as well as the scope of the trustee's affirmative
19 remedy. With respect to the antecedent debt issue as
20 withdrawn by my -- for my clients, the question of whether
21 or not, for example, the securities laws or the state laws
22 provided an antecedent debt.

23 The Judge I don't believe properly addressed that
24 issue under the rubric of an obligation. He --

25 THE COURT: I don't think he felt that he had to

Page 78

1 decide that, because his ultimate conclusion was that you
2 couldn't assert whatever those claims were as value in
3 exchange for the payments.

4 MR. LEVY: That's obviously an issue that Your
5 Honor will have to deal with.

6 THE COURT: That's how I read his -- that's how I
7 interpret what he did.

8 MR. LEVY: I don't think it's fair to say that
9 these cases -- I don't think it's fair to say that these
10 cases are fully decided.

11 THE COURT: I'm sorry what?

12 MR. LEVY: That these cases are fully -- excuse
13 me, that these cases fully bind everybody in this room. We
14 know if you look at the chronology in these cases, that lots
15 of motions by lots of defendants, including parties in
16 addition to the 84 cases of Greiff filed motions long after
17 Judge Rakoff had decided the Greiff decision in April of
18 2012.

19 We know that more motions came in after Judge
20 Rakoff decided antecedent debt in October 2013. Those are
21 all fair game. Those parties are not bound, they were not
22 parties, and I haven't heard enough, and an offense of
23 collateral estoppel type of argument which wouldn't apply
24 anyway, because they weren't defendants in the original
25 proceedings before Judge Rakoff.

1 I think we have issues that are squarely before
2 Your Honor, and within the scope of Your Honor's competency
3 to decide as a matter of bankruptcy law and SIPA. The
4 notion that my clients and other clients are wrongfully
5 withholding money that they are not entitled to, I don't
6 credit that, Your Honor, because we have a defense. The
7 trustee doesn't --

8 THE COURT: Why don't you move on to your next
9 point.

10 MR. LEVY: Of course, Your Honor.

11 The question of whether or not the obligations,
12 whether or not the debts are enforceable, whether or not the
13 claims provide an antecedent debt. I rest our argument in
14 large measure on the fact that we don't believe the language
15 of SIPA contemplates what Judge Rakoff suggested or what
16 contemplates, in any respect, the notion of shifting
17 priorities.

18 The analogy that Mr. Cremona gave you just now are
19 offsetting an administrative claim and an unsecured claim.

20 THE COURT: Well, there's a lack of mutuality
21 there.

22 MR. LEVY: Well, it's not only a lack of
23 mutuality, Judge, you're dealing with two claims that are
24 filed against the estate after the liquidation proceeding
25 began. There's either -- there's a general unsecured claim

Page 80

1 that existed at the time that the bankruptcy case was filed.
2 There's an administrative case that arises after. They get
3 paid from the estate. That's completely different with an
4 avoidance claim that may have involved a transfer some years
5 prior to the case, which was not a general unsecured claim.
6 It was not an administrative claim. It was a payment to the
7 customer who now asserts a defense, based on value and good
8 faith. That's not the same, that's not treated at all in
9 the law the same as a claim against the estate.

10 There's nothing that equates the customer's
11 entitlement to receive and retain his files, as value, for
12 value in good faith with a claim he or she may be able to
13 assert on some other basis. It doesn't make that transfer
14 claim into anything other than -- it doesn't -- there's
15 nothing that says that the transfer is to be treated as if
16 it was a claim against the estate. They are two different
17 things, and that's why the net equity decision doesn't bind
18 here, Judge.

19 The net equity decision only says, how do you
20 calculate a claim that shares in the customer property pool.
21 It says nothing about the scope of the defenses, it says
22 nothing about how far the trustee can or cannot go with his
23 remedies. It says nothing about the nature of the defense,
24 that the avoidance defendants have.

25 Your Honor, I submit that on the arguments today

1 and briefs that we've submitted, we've amply demonstrated
2 that there is reason for Your Honor to grant the motions and
3 reject the trustee's avoidance remedies on the bases that
4 I've argued today.

5 THE COURT: Thank you very much. Is this the next
6 issue?

7 MR. KUPILLAS: Yes, Your Honor.

8 THE COURT: Okay. What are you going to argue?

9 MR. KUPILLAS: Yes, Your Honor, Matthew Kupillas
10 from Milberg LLP on behalf of numerous defendants.

11 I want to focus my argument today on three areas
12 where the trustee's complaint suffer from basic fundamental
13 fatal pleading deficiencies. It's the pleading of
14 subsequent transfer claims, it's the pleading of claims in
15 cases involving multiple defendants, and it's the pleading
16 of claims involving inter account transfers.

17 Now, there is substantial overlap to my arguments,
18 so I'm happy to present them all, and then allow the
19 trustee's counsel to respond, or we can do it piecemeal if
20 Your Honor thinks.

21 THE COURT: No, go ahead.

22 MR. KUPILLAS: Okay. Before I get into that, Your
23 Honor, just as a preliminary matter, I don't believe the
24 trustee should be heard to argue that the defendants here
25 are improperly stalling these cases. My firm filed many of

1 these motions at issue today in March 2013. The trustee
2 took no action to respond to them at all until March 2014,
3 after Your Honor ordered them to do so. So I'd just like to
4 --

5 THE COURT: I think they volunteered to do so.

6 MR. KUPILLAS: That's one characteristic, yes,
7 Your Honor.

8 THE COURT: Plus with that, I would've heard Ms.
9 Chaitman's motions in March, but go ahead.

10 MR. KUPILLAS: With regard to the claims I'd like
11 to address today, the factual allegations in the complaints
12 are insufficient to meet the test for Rule 8 pleading, that
13 the Supreme Court has set out in Iqbal and Twombly.

14 Rule 8 does not require extensive pleading of
15 facts, but the trustee is required to plead sufficient facts
16 to allow the Court to draw the reasonable inference that the
17 defendants is liable for the misconduct alleged.

18 And the Supreme Court has made it clear that
19 threadbare recitals of elements of a cause of action
20 supported by mere conclusory statements do not suffice.

21 And the first area I'd like to touch on is claims
22 involving subsequent transfers, Your Honor. In the
23 complaints against my clients, and against the other good
24 faith defendants --

25 THE COURT: Are all of the allegations of

1 subsequent transfers the same in all the complaints?

2 MR. KUPILLAS: Yes, Your Honor.

3 THE COURT: What, upon information and belief they
4 were transferred to the subsequent transferees?

5 MR. KUPILLAS: In general, the exact text is, on
6 information and belief, all or a portion of the initial
7 transfers were subsequently transferred by the initial
8 transferee to the subsequent transferee defendant. That's
9 typically the complete sum and substance of the allegations,
10 nothing more.

11 These were exactly the type of threadbare recitals
12 of an elements of a cause of action and mere conclusory
13 statements that the Supreme Court says are insufficient.
14 The trustee's complaints don't identify the amounts of
15 subsequent transfers. They don't identify the dates of any
16 subsequent transfers. They don't identify how these
17 subsequent transfers purportedly took place, and they don't
18 link sufficient initial transfers to specific substantive
19 transfers.

20 THE COURT: Did they have to do all that in a
21 complaint?

22 MR. KUPILLAS: They don't necessarily have to do
23 all of that, Your Honor, but they have to do some of it.

24 THE COURT: So what do they have to do?

25 MR. KUPILLAS: Well, the case law says that in

1 cases such as this, where facts concerning subsequent
2 transfers are within the possession of the defendants, that
3 the pleading rules are relaxed, the trustee doesn't have to
4 give a dollar-for-dollar account.

5 While the pleading rules may be relaxed, they're
6 not completely thrown out the window, Your Honor. Here, the
7 trustee has done the polar opposite of giving a dollar-for-
8 dollar accounting. He's given absolutely zero facts
9 concerning the substantive transfers at issue, nothing
10 whatsoever.

11 As a result, my clients have no idea whether
12 they're being sued for \$1 in subsequent transfers, for a
13 million dollars, or for \$10 million. They have no idea if
14 the trustee is suing for subsequent transfers that took
15 place in 2008 or 2002. They have no way to defend against
16 these claims.

17 And the trustee's failure to plead these facts
18 underlying its claims is highly prejudicial, Your Honor. As
19 a result of the trustee's failure to identify the specific
20 initial transfers that were purportedly transferred to my
21 clients, my clients have no idea if those underlying initial
22 transfers are --

23 THE COURT: Didn't Judge Lifland, though, decide
24 this already in the family transfer case?

25 MR. KUPILLAS: He did, Your Honor. In fact, he

1 decided it, and he dismissed the claims. The claims in that
2 case were essentially identical to the claims against my
3 client, and he found -- Judge Lifland tossed those claims
4 out. It wasn't a close call, Your Honor. He made clear
5 that those were clearly insufficient even under the relaxed
6 pleading standard that the trustee is granted.

7 Now, for whatever reason, the trustee did not even
8 address the Madoff family case in his opposition. I think
9 that speaks volumes. Instead he raised the Merkin and Chase
10 (ph) decisions by Judge Lifland from 2011.

11 THE COURT: Well, the Merkin complaint was very
12 differnet. That just dealt with that.

13 MR. KUPILLAS: That's absolutely --

14 THE COURT: Or at least the third amended
15 complaint, I don't know about the second amended complaint.

16 MR. KUPILLAS: The complaint that Judge Lifland
17 looked at was also very detailed, Your Honor. In fact, in
18 the family action, he used the Merkin and Chase cases as
19 examples of well pled complaints, and contrasted them
20 against the claims in the family action, which again are
21 identical to the claims here.

22 Most recently Your Honor addressed subsequent
23 transfer claims in the Merkin action that -- from the
24 decision that you issued on August 12th. And as you say,
25 the claims in that case also provide a good contrast against

1 the claims asserted by the trustee against my clients. So
2 as you know, the trustee identified specific amounts that
3 were transferred, specific initial transferees, specific
4 subsequent transferees, he identified the dates of the
5 transfers, and he provided evidence linking the initial
6 transfers to certain subsequent transfers. Those are
7 exactly the types of factual details that are completely
8 absent here, Your Honor.

9 And again, I want to get back to the point,
10 because the trustee has failed to identify the initial
11 transfers that were purportedly transferred to my clients,
12 my clients have no idea whether there are any actionable
13 claims against them right now. For all they know, the
14 initial transfers that they're being sued for, and
15 subsequently receiving, took place in 2003, well outside the
16 look-back period. So all my clients know, the complaints
17 asserted against them should be tossed out right now, and
18 they're essentially defending against claims that have
19 already been dismissed. That type of pleading should not be
20 allowed to stand, Your Honor.

21 Now, the next area I'd like to get to, actually
22 before I moved on to multiple cases involving multiple
23 defendants, additionally, in his subsequent transfer claims,
24 the trustee tries to plead in the alternative that the
25 subsequent transferee defendants may instead be liable under

1 Section 548, as intended beneficiaries of the initial
2 transfers.

3 In each of the claim -- in each of the complaints
4 where he asserts subsequent transfer claims, he inserts an
5 additional paragraph where he says, "To the extent funds
6 transferred from BLMIS were for the benefit of the
7 subsequent transferee defendant, subsequent transferee
8 defendants is the initial transferee is subject to transfers
9 and is included in the definition defendants." And that's
10 where he asserts the 548 claims against them.

11 However, the trustee fails to set forth any facts
12 underlying his allegation that my clients or any of the
13 other subsequent transferee defendants, in fact, were the
14 intended beneficiaries. He asserts no facts whatsoever
15 underlying that claim.

16 In fact, the trustee's use of the phrase to the
17 extent that in his allegation, appears to be a concession
18 that he does not have any facts underlying his claim, and
19 that he's simply looking to acquire those facts in
20 discovery.

21 Now, we know that's not a proper form of pleading,
22 Your Honor. If he wants to plead a claim under 548 against
23 these clients of mine, these defendants, he should have some
24 kind of factual underpinning to do so.

25 The same issue was addressed by this Court in the

1 Dryer LLP liquidation, in the Gowan v Novertore Credit
2 Management (ph) case, Judge Glenn dismissed the trustee's
3 claims that an alleged subsequent transferee may have
4 instead been liable under 548 as the initial -- as the
5 intended beneficiary of the initial transfers.

6 Judge Glenn found that the complaint "does not
7 contain any nonconclusory allegations of any financial
8 benefit." And then in a related decision, Judge Glenn threw
9 out the trustee's intended beneficiary claims against the
10 different defendant, Amerynth LLC (ph) holding that
11 "incidental unquantifiable or remote allegations of benefit
12 are not sufficient."

13 The trustee's conclusory allegations against my
14 clients, Your Honor, have even less factual support than the
15 claims in the Dryer case, and they should be dismissed for
16 the same reasons.

17 In his opposition brief, the trustee argues that
18 he should be allowed to plead in the alternative. And
19 certainly, plaintiffs are allowed to plead in the
20 alternative, but pleading in the alternative, Your Honor, is
21 not a license to plead insufficient for unsupported claims.

22 Now, the third area that I'd like to -- the next
23 area I'd like to address, Your Honor, is the trustee's
24 inadequate pleading of avoidance claims, initial avoidance
25 claims in cases involving multiple defendants.

1 The trustee's claims in these cases are
2 inadequately pled because the complaints don't include
3 sufficient details put each defendant on notice of the
4 specific transfers that they're being sued for.

5 THE COURT: All of the complaints I looked at had
6 charts by defendant, which identified all of the deposits
7 and withdrawals in the account, presumably from day one.
8 What more does he have to allege?

9 MR. KUPILLAS: He has to specify in his claims
10 which transfers and which specific accounts he's suing each
11 individual defendant.

12 THE COURT: He's suing for every transfer within
13 two years and within six years.

14 MR. KUPILLAS: Well, just to give you an example,
15 Your Honor. In one of the --

16 THE COURT: You don't think that's what he's
17 doing?

18 MR. KUPILLAS: -- complaints against one of my
19 clients -- he is, but take an example. In the case against
20 one of my clients, he has sued three other entities as
21 initial transferees, the trustee's complaint identifies over
22 a hundred initial transfers from four different Madoff
23 accounts that he's seeking to avoid and recover.

24 THE COURT: But don't the attachments show which
25 accounts received which transfers?

1 MR. KUPILLAS: The trustee does not specify that
2 he's only seeking to recover those transfers from that
3 specific defendant's Madoff account. And, in fact, if the
4 trustee is willing to stipulate to that today, I would be
5 very surprised, because I happen to think that he's looking
6 to go beyond that.

7 In any case, it's not noted in his pleadings. He
8 does not state the specific transfers that he's seeking to
9 recover in the counts at the end of each complaint, he says
10 that defendants -- he is suing defendants to avoid and
11 recover the transfers without any specification along --

12 THE COURT: In defining them, isn't there a
13 reference to the chart?

14 MR. KUPILLAS: He --

15 THE COURT: What's the number of one of the cases
16 that you're talking about?

17 MR. KUPILLAS: I'm talking about 10-04966.

18 THE COURT: 0 --

19 MR. KUPILLAS: 4966.

20 THE COURT: Go ahead.

21 MR. KUPILLAS: And in that case, he attaches
22 lengthy charts at the end relating to four accounts. And if
23 the trustee had properly pled his complaint, he could have
24 said, I'm suing Defendant A for all of the transfers he
25 received from his Madoff account, but the trustee does not

1 do that, Your Honor.

2 He simply defines transfers, that's all transfers,
3 and he says, I'm suing defendants for the avoidance and
4 recovery of transfers without any specification, any
5 delineation.

6 As a result, the complaint doesn't provide any way
7 for my client to know which of these over a hundred
8 avoidable transfers, allegedly avoidable transfers he's
9 being sued for, as far as recovery. And again, because they
10 don't identify the specific transfers like common --

11 THE COURT: But isn't the answer that the
12 complaint is sufficiently alleged, to the extent he
13 identifies specific transfers to a specific defendant?

14 MR. KUPILLAS: It identifies specific transfers to
15 specific defendants, Your Honor, but it does not say in any
16 instance that he is limiting his claims for recovery of
17 those -- of any transfers to the defendant who was the
18 initial transferee.

19 THE COURT: Then how else can he sue somebody?

20 MR. KUPILLAS: He could be suing as an intended
21 beneficiary under 548. He could be suing as somebody as a
22 principal of one of the defendant entities. It's entirely
23 unclear, Your Honor, and that's why the trustee's complaints
24 are insufficient.

25 Again, because the complaints don't identify the

1 specific transfers, my clients don't know if the trustee is
2 seeking to recover transfers that are unavoidable because
3 they took place prior to the two year look-back.

4 THE COURT: But you can tell that from looking at
5 the chart.

6 MR. KUPILLAS: You can tell that there were
7 transfers within the two years, yes, Your Honor, but again,
8 the trustee does not limit his claims to -- against my
9 clients to only those initial transfers from their Madoff
10 accounts, he does not do that. And that's why his claims
11 are inadequate.

12 Now, the trustee didn't respond to our argument in
13 his opposition brief. Again, instead he argued that he
14 shouldn't be required to file a separate action for each
15 defendant or for each Madoff account, and that's not what
16 we're arguing, Your Honor. Of course, the trustee is free
17 to file cases involving multiple defendants.

18 What we're saying is that when he does so, his
19 complaints have to identify the specific transfers that he's
20 seeking to recover from each specific defendant. The
21 trustee's complaints against my clients fail to do so, and
22 as a result, those claims should be dismissed.

23 Now, the last area I'd like to address, Your
24 Honor, is the trustee's inadequate pleading of claims
25 involving inter account transfers.

1 Now, Your Honor has heard argument concerning
2 inter account transfers before, so I don't want to get into
3 the entire -- the trustee's entire methodology. To
4 summarize, the trustee doesn't consistently give full claim
5 to transfers between Madoff accounts. Instead, he looks at
6 the transferor account, he runs his net investment
7 methodology, it's money in, he sees that there was
8 sufficient at equity at the time of the inter account
9 transfer to fund that transfer. And if he says that if
10 there wasn't sufficient net equity in the transferor
11 accounts at the time, he doesn't give full credit to the
12 transferee accounts, in his calculation of principal balance
13 or net equity.

14 The problem with his complaints, Your Honor, is
15 the trustee doesn't contain -- the complaints don't contain
16 any information about the transferor account, other than the
17 --

18 THE COURT: Except the final number.

19 MR. KUPILLAS: Except the final number. He does
20 not give any facts concerning the deposits and withdrawals
21 into those transferor accounts. He doesn't identify the
22 customer, the owner of those accounts --

23 THE COURT: But why does he have to do that as a
24 matter of pleading? Someday maybe the trustee will have to
25 show how he calculated the transferor's net equity, for lack

1 of a better phrase, but for pleading purposes, isn't his
2 complaint really saying, I reviewed the accounts of the
3 transferor, I subtracted the withdrawals from the deposits,
4 and here's the number I got.

5 What you're saying is, that's not enough, but why
6 not for pleading purposes?

7 MR. KUPILLAS: Yes, Your Honor, I'm saying he has
8 to give the backup, because without the backup --

9 THE COURT: Why?

10 MR. KUPILLAS: -- there's no way of knowing
11 whether, in fact, those claims have a plausible basis.

12 THE COURT: But that's -- isn't that what
13 discovery is for? He'd pled a fact that at the date of the
14 transfer, the net equity in the account was X. That's a
15 fact. He doesn't have to plead the evidence that leads him
16 to that fact.

17 MR. KUPILLAS: I can see that this is a close
18 call, Your Honor, and you know, it may be that you think
19 given the final balance is sufficient. I would posit that
20 if the trustee has this information in his possession and he
21 could've provided it, I simply don't understand why he
22 didn't --

23 THE COURT: Because you made a motion to dismiss,
24 why should he provide you with discovery?

25 MR. KUPILLAS: No, initially when he --

1 THE COURT: So if he gives you that information,
2 are you going to withdraw your motion?

3 MR. KUPILLAS: I haven't asked for discovery, Your
4 Honor.

5 THE COURT: Okay.

6 MR. KUPILLAS: What I'm saying is that he
7 should've pled the -- if he has the information, if he has
8 the detail about the deposits and withdrawals in the
9 transferor's accounts, he should've pled it in his
10 complaints, he doesn't. And that's -- those are my
11 arguments on that, Your Honor.

12 THE COURT: Okay. Thank you. Anyone else want to
13 be heard on these particular issues? Okay. Go ahead, Mr.
14 Cremona.

15 MR. CREMONA: Thank you, Your Honor.

16 As I think Your Honor noted and as Mr. Kupillas
17 pointed out himself, the trustee here is a stranger to the
18 transaction, is entitled to deference and has a lesser
19 burden.

20 THE COURT: Yeah, but the Court -- on the
21 subsequent transfers, Judge Lifland had ruled that it's not
22 enough to say upon information and belief the transfers were
23 made to the subsequent transfers and for their benefit.

24 MR. CREMONA: I understand that, but also Judge
25 Lifland said in the Chase case, that the Court has relaxed

1 the tracing burden, and has relaxed what needs to be
2 demonstrated.

3 THE COURT: You know, I've seen a lot of cases
4 where the kind of pleading that they're complaining about,
5 the subsequent transfers just isn't enough.

6 MR. CREMONA: I understand that, Your Honor, but
7 as you pointed out, every one of our complaints has a
8 detailed Exhibit B to it. It identifies every single
9 transfer, the date of the transfer --

10 THE COURT: I'm not talking about the individual -
11 - of the initial transfers, I'm talking about the subsequent
12 transfers.

13 MR. CREMONA: Right, but again, Your Honor, the
14 defendants in the case are identified, they are referred to
15 the transfers on the exhibit, they're on notice. I believe
16 that we've met our pleading standard to put them on notice
17 of our claim.

18 As Your Honor pointed out, we've identified
19 transfers that are presumed to be true on the date that they
20 say we occurred, and we're entitled to that presumption.

21 THE COURT: I don't recall you identifying any
22 subsequent transfers.

23 MR. CREMONA: I believe we --

24 THE COURT: You're just saying I think that the
25 money was transferred to the subsequent transferees.

1 MR. CREMONA: Well, I think we're saying that in
2 these cases, we have small groups, we have partnerships, we
3 have trusts. It's evident from the face of the complaint
4 where the transfers may or may not have gone. We've pled in
5 the alternative to preserve our claims both against someone
6 that may have been an initial and/or a subsequent, I think
7 we're entitled to do that. I think we've done so, and done
8 so in a way that puts everybody on notice. And I think that
9 that does meet the Rule 8 standard that we're subject to.

10 And as far as the inter account transfer issue,
11 again, I think similarly as Your Honor noted, every account
12 is referenced, the account number is there, the parties are
13 on notice, I don't think we're arguing the net equity --
14 excuse me -- yeah, the net investment method or how it was
15 applied in the inter account transfers, but as far as the
16 exhibits to the complaint, again we've more than adequately
17 pled and put parties on notice of our claims as to what
18 accounts they're related to, and what transfers, as to --
19 and to whom. Thank you, Your Honor.

20 THE COURT: Anyone want to reply on this
21 particular issue?

22 MR. KUPILLAS: Yes, Your Honor, just very briefly.

23 I don't want to belabor the point about Judge
24 Lifland's prior decisions. I think --

25 THE COURT: I'm aware of them.

1 MR. KUPILLAS: -- Your Honor is familiar with
2 them.

3 Now, Mr. Cremona in his argument just mentioned
4 that the complaints do, in fact, identify some subsequent
5 transfers. I'm not -- I believe that's not the case in any
6 complaints against my clients, I haven't seen any.

7 MR. CREMONA: Just to be clear, Your Honor, I
8 don't think that's what I said. I said that all the
9 transfers are identified on the exhibit, and all the
10 defendants are confined in the complaint, referred to the
11 exhibit.

12 MR. KUPILLAS: Okay. Well, I'm sorry about
13 mistaking that, Your Honor, but if that's the case, then
14 there's no indication, no representation from the trustee
15 that any subsequent transfers have been identified in the
16 complaints.

17 And Mr. Cremona says it's evidence in some cases
18 that certain initial transfers were subsequently transferred
19 to certain defendants. But, in fact, that was the trustee's
20 basis from the Madoff family action. It was a case where he
21 believed it was evident that Bernie Madoff had transferred
22 some money to some of his kids, and what Judge Lifland said
23 is that that's mere speculation. You have no evidence of
24 that, and absent any evidence, your claims have to be
25 dismissed.

1 THE COURT: Thank you. Why don't we take a five
2 minute recess and then we'll move on to the next set of
3 issues.

4 (Recessed at 3:42 p.m.; reconvened at 3:52 p.m.)

5 THE COURT: Please be seated. Let's continue.

6 MS. NEVILLE: Good afternoon again, Your Honor,
7 Carole Neville, the gang leader probably.

8 I'm here to address another one of Judge Rakoff's
9 decisions relegated to the footnote, which is the protected
10 retirement accounts.

11 THE COURT: Okay.

12 MS. NEVILLE: And as a threshold matter, I'd like
13 to say that these statutes protecting retirement accounts
14 reflect a policy that competes importantly and well with the
15 policy of the trustee's equitable distribution, making it
16 ripe for the victims.

17 THE COURT: Is this the CPLR argument or --

18 MS. NEVILLE: Yeah, it's the CPLR.

19 THE COURT: But this is 5205?

20 MS. NEVILLE: Yeah.

21 THE COURT: But isn't that only relevant if the
22 trustee gets a judgment and tries to enforce it? How does
23 it bear on whether he states a claim?

24 MS. NEVILLE: Because I think it like -- it is
25 effectively an affirmative defense, if you can't get a

1 judgment against a protected account, it is -- there's no
2 point in bringing the action. I mean, the only thing that
3 he's suing here, IRS and Keyhose (ph) and Spencer Trust (ph)
4 that are -- he can't get a judgment against or can't execute
5 against.

6 And my point to here, Your Honor, is that these
7 reflect a policy of protecting retirement income against the
8 claims of creditors that is -- it's both a national policy
9 and a state policy. I mean, social security benefits are
10 protected, ERISA has an anti-alienation provision, and 45
11 states have enacted statutes just like 5205.

12 THE COURT: But I come back to these are exemption
13 statutes.

14 MS. NEVILLE: No, these are not --

15 THE COURT: There's no statute that says you can't
16 sue an IRA, is it?

17 MS. NEVILLE: You can't -- there is no statute
18 that says that, but the way these cases generally arise is
19 on motion to dismiss, because you can't get a judgment, and
20 somebody's either seeking to -- before they actually have a
21 judgment to restrain an account, and they can't actually do
22 that.

23 The anti-alienation provision protects these
24 accounts in a number of --

25 THE COURT: Well, 5205 refers to -- as an

Page 101

1 exception to the exemption if the transfer was a fraudulent
2 transfer under New York law.

3 MS. NEVILLE: Right. I --

4 THE COURT: And I raised this before, if you have
5 a copy of it.

6 MS. NEVILLE: Yeah, I do. I actually --

7 THE COURT: And does the trustee actually have to
8 get a judgment under New York law, or is it sufficient if
9 the transfer entity account that he's getting to was a
10 fraudulent transfer under New York law?

11 MS. NEVILLE: Say that again.

12 THE COURT: In other words, it's conceivable that
13 although he can't assert a claim under New York law,
14 whatever was put into that account fits all the elements of
15 a New York fraudulent transfer, even without the judgment,
16 but with a judgment, let's say for breach of contract claim,
17 could he go in and seek to recover those funds, because they
18 were put into the account in violation of the New York
19 Debtor/Creditor Law?

20 MS. NEVILLE: That's an interesting --

21 THE COURT: Or is exemption --

22 MS. NEVILLE: I don't think so, no.

23 THE COURT: -- limited to enforcing a judgment
24 that he gets under Article 10 of the Debtor and Creditor
25 Law?

1 MS. NEVILLE: That's what I think the statute
2 says.

3 THE COURT: Is there any --

4 MS. NEVILLE: There are two exceptions.

5 THE COURT: -- cases that interpret that?

6 MS. NEVILLE: That particular one, you know, the
7 way -- if I can just go through it a little bit, because the
8 way this statute works is, it's bereft of pronouns, so you
9 don't really know who's doing what to whom. But basically
10 it is about a judgment debtor which would be comparable,
11 basically to my client, my client's holding accounts.

12 And they make a transfer to a protected entity,
13 and then the exemption kicks in. If it's made with an
14 intent to hinder, delay, or defraud his or her creditors, my
15 client's creditors, not the trustee's creditors.

16 The trustee in this case is acting as if it is the
17 judgment debtor, which is not the entity that the exemption
18 applies to.

19 THE COURT: I thought you were trying to protect
20 this account from collection efforts by the trustee,
21 assuming he wins.

22 MS. NEVILLE: Correct.

23 THE COURT: And isn't that what this statute is
24 for, to protect the judgment debtor, possibly your client
25 against efforts to collect from the account?

1 MS. NEVILLE: Well then, it could be a matrimonial
2 or a contract claim misuse as you said. It's not the kind
3 of fraudulent conveyance action that is intended by this
4 statute. This statute covers my client's transfer to a
5 protected account to evade its creditors. That's what the
6 statute covers. For all the --

7 THE COURT: Well, it says a fraudulent transfer
8 under New York law, it's not just an intentional fraudulent
9 transfer.

10 MS. NEVILLE: No, well, it could be, you know, a
11 constructive one that rendered my client insolvent too, but
12 it's about us, it's about our clients holding these
13 accounts. The fact that the trustee has alleged a
14 fraudulent conveyance, he could, and to stretch it a little
15 bit, there's another exemption for matrimonial spousal
16 maintenance claims, so he could have a spousal claim and
17 then have an equal claim against my client on some other
18 thing, and say that he's exempt because he has a judgment
19 for matrimonial.

20 The fraudulent conveyance claim the trustee has is
21 not the fraudulent transfer conveyance that's covered by
22 this statute. It's my client's effort to evade its
23 creditors.

24 THE COURT: It's referring to the additions to the
25 account. And I think he's alleging, or seems to be alleging

1 that in the case of the clients you're asserting this for,
2 got transfers from Madoff Securities and put the money in
3 the account, and that's the addition, and that addition was
4 a fraudulent transfer for all the reasons he's alleged in
5 the complaint.

6 MS. NEVILLE: Well, this -- what I'm trying to say
7 is this statute covers the intent would be my client's
8 intent to hinder and delay its creditors, not his.

9 THE COURT: Oh, I see what you're saying.

10 MS. NEVILLE: And so it's -- unfortunately, it's
11 not particularly clear when it says additions to, it doesn't
12 say the judgment debtors additions to, it's just additions.

13 The same thing is true with the marital exemption.
14 It doesn't say who has the claim, and who's claiming it
15 against who. So this is actually covering -- what the
16 trustee is alleging is a fraudulent transfer to my client,
17 not a fraudulent transfer by my client.

18 THE COURT: I understand the distinction you're
19 making.

20 MS. NEVILLE: The second part of that, though, is
21 that this refers to fraudulent conveyances under Article 10
22 of the Debtor and Creditor Law. And where this statute
23 wanted to refer to the Bankruptcy Code, it does expressly,
24 if you look at the bottom of page 1, the section that
25 defines the accounts refers to the federal exemption, and it

1 says, the federal exemptions under --

2 THE COURT: Where are you reading from?

3 MS. NEVILLE: -- 100 -- this is paragraph 3, it's
4 yellow highlighted at the bottom of page 1. Do you have a
5 yellow highlighted one?

6 THE COURT: Yes, I do. Well, this just says it
7 applies in bankruptcy cases.

8 MS. NEVILLE: I know. But my point is, that if it
9 wants to refer to the Bankruptcy Code, it refers to the
10 Bankruptcy Code, and here it's referring to Debtor and
11 Creditor Law. And, you know, I've researched this case up,
12 down and around the clock, all of the cases are cases where
13 a debtor who is either about to go to trial or has a
14 judgment against him, or is in trial, transfers property to
15 an exempt account, a trust, an IRA.

16 There's one case where a couple transferred a
17 condominium to a trust. And only one of the parties was a
18 defendant, and the case says, you can only go after the
19 fraudulent conveyance of the party who had the claim pending
20 against him at the time from the couple.

21 So I think for two reasons that exception to the
22 exemptions doesn't apply. And the policy of protecting
23 retirement income which is near and dear to my heart for a
24 lot of reasons, is really clear in the provision D which
25 goes on to really exempt the withdrawals, a hundred percent

1 of the withdrawals are exempt, and there's no exclusion for
2 fraudulent conveyance there.

3 So what Judge Rakoff said basically was, he read
4 that you had to have -- you had to be exempt under provision
5 C for the income to be exempt. But if the exception doesn't
6 apply, then the principal is exempt, the interest is exempt,
7 and the withdrawals are exempt.

8 I think there -- I just want to summarize that
9 that's a very strong public policy here. For most of these
10 people, these retirement accounts are their last money.
11 They lost it. Whatever was left in those accounts are gone.
12 Some of them I know very well, and they're living on social
13 security now. Fortunately, social security is protected
14 from the trustee's claims.

15 So basically there is a policy here that competes
16 with taking care of the victims, and there is absolute law
17 that says, you can't touch these accounts.

18 THE COURT: But are you saying that for pleading
19 purposes, if the trustee is suing an account that comes
20 within this exemption, he has to allege that his defendant
21 put the money into the custodial account with fraudulent
22 intent? Have you got a case that supports that?

23 MS. NEVILLE: No, because I can just show you that
24 every case is about that party putting money in to evade its
25 creditors.

1 THE COURT: I'm talking about a pleading standard
2 now, because this is --

3 MS. NEVILLE: Oh, under pleading standards.

4 THE COURT: -- as I said when we started, this was
5 a -- this is a judgment enforcement issue.

6 MS. NEVILLE: I just -- I think I have that. We
7 raised that issue with Judge Rakoff. We actually raised
8 with Judge Rakoff the question of whether or not the
9 mandatory withdrawals under tax law conflicted with the
10 SIPA, and he threw that out. And this was kind of an aside,
11 it was relegated to a footnote.

12 But I think that affirmative defenses are
13 available on a pleading, at the pleading stage when they're
14 clear on the face. And all of these accounts, and the
15 trustee's not really disputing that these accounts are
16 protected accounts are -- we raise it on the pleading level,
17 and it can be dismissed at that level.

18 THE COURT: Okay. Thank you.

19 MR. CREMONA: Your Honor, I think as Ms. Neville
20 pointed out, this issue was decided in two different ways by
21 the Greiff decision, which again I believe is binding on her
22 and her clients.

23 First, the issue of whether mandatory withdrawals
24 are insulated from avoidance was determined in Greiff and
25 Judge Rakoff focused on the fact that even though the

1 account is a retirement account, similar to this other
2 provision, you need to have a legal entitlement to the
3 proceeds in that account, which the defendants here do not,
4 because those proceeds are fictitious profits.

5 THE COURT: What Ms. Neville is arguing, and let's
6 take this out of the realm of a motion to dismiss for the
7 moment.

8 MR. CREMONA: Uh-huh.

9 THE COURT: You get a judgment, in order for you
10 to invade that account, or collect your judgment from that
11 account, you would have to show presumably in a special
12 proceeding that that money was fraudulently transferred into
13 that account. That's what she's arguing. That your
14 transferee made a fraudulent transfer of that money under
15 Article 10 of the Debtor and Creditor Law into that account.
16 That's what she's arguing.

17 MR. CREMONA: Okay. But I think on -- in the
18 first instance, whether she has -- that sounds to me almost
19 like a judgment proof type of argument, that it exempts
20 assets. That's not a defense to an avoidance issue.

21 THE COURT: That I think I agree with you.

22 MR. CREMONA: So whether she's judgment proof or
23 not has nothing to do with the viability of our avoidance
24 action. So -- but I also think Judge Rakoff looked at it
25 and focused on the fact that any additions to that account

1 could be deemed to be fraudulent, because the proceeds are,
2 in fact, derived from a fraudulent transfer. And those
3 additions are, in fact, fraudulent.

4 But putting that aside, I think as Your Honor
5 already pointed out, that's a down the line issue, and
6 whether she has a defense does -- has no -- well, a defense
7 to a judgment, has no bearing on the viability of our
8 avoidance action.

9 I would also just point out, I'm not sure where we
10 are with the IRA argument, if it's abandoned or not. Is it?

11 THE COURT: Which argument is that?

12 MS. NEVILLE: No, I'm not arguing about mandatory
13 withdrawals.

14 MR. CREMONA: Okay. Then based on -- unless Your
15 Honor has any other questions, I think we can resolve that
16 issue.

17 THE COURT: Thank you.

18 MR. CREMONA: Thank you.

19 THE COURT: Next?

20 MS. CHAITMAN: Next. Helen Davis Chaitman of
21 Becker and Poliakoff, Your Honor. I'm going to focus on two
22 arguments among the numerous arguments that I've asserted.

23 The first argument I want to address is that the
24 claw back suits violate the defendant's right to due process
25 of law. And I cite in my brief a long and unchallenged line

1 of United States Supreme Court decisions which deal with a
2 law enforcement figure, a governmental official, a quasi-
3 governmental official having an economic interest in a --

4 THE COURT: You know I read those cases. That's
5 where the decision-maker of the dispute has an economic
6 interest.

7 MS. CHAITMAN: No.

8 THE COURT: Are you saying I have an economic
9 interest in this?

10 MS. CHAITMAN: No, no, no. No, no, no. Where the
11 person who determines -- if a prosecutor determines to
12 prosecute a case, he's not the decision-maker, but he brings
13 the indictment --

14 THE COURT: Right.

15 MS. CHAITMAN: -- if that person has an economic
16 interest in bringing that indictment, it's a violation of
17 due process, that's what those cases say. And we have here
18 the admission by the trustee that he gets a percentage of
19 the fees paid to his law firm. The --

20 THE COURT: But every trustee, putting aside this
21 case decides whether to bring avoidance actions or
22 preference actions or any actions, and ultimately gets a
23 commission based on the amount of money he or she
24 distributes, which is money they bring into the case.

25 MS. CHAITMAN: Yes, but this is --

1 THE COURT: So you're saying that's all
2 unconstitutional?

3 MS. CHAITMAN: This is -- no, this is quite
4 different. And if -- Mr. Picard gets paid regardless of
5 whether he brings money into the estate. He filed over a
6 thousand avoidance actions, I don't know the exact number
7 that have been dismissed, but he was seeking originally \$100
8 billion, about 97 billion of that has been dismissed by the
9 Second Circuit and by the district court.

10 So he gets paid even though he didn't recover in
11 those cases. And Mr. Cremona just said it, whether the
12 defendant is judgment proof in Ms. Neville's cases, is
13 irrelevant to the viability of the complaint.

14 THE COURT: Well, as a legal matter that's
15 probably correct.

16 MS. CHAITMAN: Yes, but that demonstrates the
17 precise conflict of interest that the trustee has. He gets
18 paid, even if he asserts a claim upon which the estate
19 cannot possibly recover, and that's precisely the example
20 that Ms. Neville gave.

21 So we have here precisely that situation. He's a
22 quasi-governmental official, he denies it, but in fact, he
23 himself asserted that as an objection to producing documents
24 in the Merkin case.

25 And the trustee now says, well, that was a long

1 time ago, but if Your Honor wants to have an evidentiary
2 hearing on it, I believe I can establish that the trustee
3 never withdrew that objection in the Merkin case. He has a
4 Rule 11 obligation not to assert grounds for refusing to
5 produce documents, if he doesn't have a good faith basis for
6 it. So he, himself admitted he was a quasi-governmental
7 official. And, in fact, I annex as an exhibit to my
8 declaration a statement that was made by the U.S. Attorney
9 that Mr. Picard was appointed an official to distribute
10 funds that were collected by the government.

11 THE COURT: Is that the victim's fund you're
12 talking about?

13 MS. CHAITMAN: Yes. And he --

14 THE COURT: How long was he in charge of the
15 victim's fund?

16 MS. CHAITMAN: Well, he was in charge of the
17 victim's fund during the precise period of time when these
18 complaints were filed.

19 So, you know, the fact that he's no longer -- I
20 don't know precisely why he's no longer in charge of that
21 fund, but we asserted his inability to proceed with these
22 cases, and it's very possible that he decided after we
23 asserted the -- this argument, that he shouldn't be a
24 governmental official. But, in fact, he cites the Adler-
25 Coleman case when he doesn't want to produce documents in

1 the Merkin case, he cites the Adler-Coleman case with the
2 proposition that he is a quasi-governmental official.

3 So I think that there's a fundamental defect in
4 his standing to sue. And I think you can distinguish a
5 situation where a trustee gets paid a percentage of a
6 recovery, that's entirely different from what's going on
7 here, because this trustee gets paid regardless of whether
8 there's a recovery, regardless of whether there's a viable
9 claim.

10 THE COURT: But wouldn't he still have the same
11 economic interest if he got paid based on a recovery? He
12 still has an economic interest in the outcome of the
13 litigation. He might have more of an economic interest, but
14 he still has an economic interest.

15 MS. CHAITMAN: I think he -- what we're focusing
16 on, Your Honor, is the decision, it's the prosecutorial
17 decision is the decision to sue. He has an economic
18 interest in deciding to sue all of our clients, regardless
19 of whether he has a bona fide claim, because he benefits
20 either way. And I think that that's the due process
21 violation.

22 My second argument if I can go through both of
23 them, and then have the trustee respond, Your Honor, is that
24 the complaints are deficient under Article 3 of the United
25 States Constitution because the trustee lacks injury in

1 fact. And I rely very heavily for this argument on the
2 Second Circuit's decision in the HSBC/JPMorgan Chase case.
3 If Your Honor looks at that decision with this argument in
4 mind, you will see that the Second Circuit cites New York
5 law for the proposition that a trustee who steps into a case
6 where a thief took money from a customer; the thief never
7 took title to the money and the trustee doesn't take title
8 to the money. The Second Circuit said that in the HSBC
9 case.

10 THE COURT: But you do have a statute which gives
11 the trustee standing, the fiction that the Second Circuit
12 mentioned.

13 MS. CHAITMAN: Yes.

14 THE COURT: Why doesn't that cure whatever
15 difficulties the trustee otherwise has with respect to
16 standing?

17 MS. CHAITMAN: Because the Supreme Court cases
18 that we cite in our brief, Your Honor, and there's a long
19 line of them, it's never been -- that tradition has never
20 been challenged, that the Supreme Court says, Article 3
21 injury is so fundamental, that Congress can't remedy it, and
22 there are a number of Supreme Court cases where someone who
23 had standing pursuant to a statute was held by the United
24 States Supreme Court to lack standing, because he had no
25 injury in fact, he had no Article 3 injury.

1 So you can't cure the deficiency with a statute.
2 And that's the only argument that the trustee has made
3 against my argument, that SIPA gives him that standing.
4 Well, that's precisely what the Supreme Court held. If you
5 haven't suffered an injury in fact, Congress can't give it
6 to you. It's more fundamental than a congressional act.

7 So I think, Your Honor, if you look at the HSBC
8 case, you will see that the Court held that Mr. Picard did
9 not have standing to pursue in that case common law claims -
10 -

11 THE COURT: Well, common law claims I understand.
12 There's no statute that gives him the authority to pursue
13 common law claims, and there's Supreme Court case law like
14 Kaplan and some of these other cases which say he can't.
15 But here you have a statute which gives him standing, and
16 what case stands for the proposition that Congress can't
17 give him standing that he otherwise lacks?

18 MS. CHAITMAN: If you just give me a minute --

19 THE COURT: Sure.

20 MS. CHAITMAN: -- and I'll pull out those
21 arguments in my brief.

22 If you look at page 11 of my brief, Your Honor --

23 THE COURT: It's not exactly accessible, if you'll
24 just give me the citations to the case.

25 MS. CHAITMAN: Sure, sure. Well, there are Second

1 Circuit -- here's one, GAF Holdings LLC, this is not Supreme
2 Court, versus Rinaldi, 639 F.3d 402, that's Eighth Circuit
3 2011. And then the Supreme Court cases are Allen versus
4 Wright.

5 THE COURT: That's the -- one of the principal
6 standing cases that discuss granting statutory standing. I
7 know the law is --

8 MS. CHAITMAN: Yeah.

9 THE COURT: -- I know that the standing principal
10 is you have to have an injury in fact. The question I've
11 raised is whether, and you apparently say this can't occur,
12 is Congress can't confer standing by statute, as it did in
13 SIPA.

14 MS. CHAITMAN: Right.

15 THE COURT: So what cases say that Congress can't
16 do that.

17 MS. CHAITMAN: Okay. Hold on just one second, let
18 me find that for you. You know what, Judge, I don't want to
19 hold you up, if I can just --

20 THE COURT: I'll find it. What pages are they?
21 What pages should I review in your brief?

22 MS. CHAITMAN: I'm sure it's here, I just don't
23 see it. It starts at page 11, and I'm sure by the time Mr.
24 Cremona finishes, I'll find it for you.

25 THE COURT: Okay. Thank you.

1 MS. CHAITMAN: Okay. Thank you.

2 THE COURT: Thank you. Mr. Cremona.

3 MR. CREMONA: Your Honor, as far as the first
4 argument that Ms. Chaitman made as to whether or not Mr.
5 Picard is a quasi-governmental actor, I think we've
6 addressed that a number of ways, based on the letter that we
7 submitted to Your Honor. We've gotten guidance from the
8 Second Circuit as to what SIPC is exactly and SIPC is not a
9 governmental entity. It is a non --

10 THE COURT: Well, the statute says that also.

11 MR. CREMONA: Right, indeed, and it's a non-profit
12 corporation, and we got that guidance from the Second
13 Circuit in the executive securities case that we referenced
14 in our letter to Your Honor.

15 Also, the net equity decision in this case
16 identifies SIPC as a non-profit corporation. So by
17 extension, I mean, Irving is certainly not a decision-making
18 -- a decision-maker for SIPC, nor is SIPC a decision-maker
19 for Irving; therefore, by extension, Mr. Picard is not a
20 quasi-governmental actor as Ms. Chaitman asserts. Moreover
21 --

22 THE COURT: And they disagreed in Morgan Kennedy,
23 and that one had to go to the circuit.

24 MR. CREMONA: I'm sorry?

25 THE COURT: The SIPA trustee and SIPC disagreed in

1 Morgan Kennedy, and they had to go to the circuit --

2 MR. CREMONA: Right.

3 THE COURT: -- to iron that one out.

4 MR. CREMONA: Exactly, Your Honor. Clearly at
5 times, they've taken contrary positions, as we have in this
6 case, Your Honor. So I think it's quite clear then based on
7 the guidance that we've received and the express language of
8 the statute, that Mr. Picard is not a governmental actor in
9 any way, shape, or form. We've had these discussions with
10 Ms. Chaitman many times before Judge Lifland, and also
11 before Judge Rakoff as we've detailed in our papers.

12 I would leave it at that, unless Your Honor has
13 any questions as to that issue.

14 On the other issue, as to whether or not there's
15 an Article 3 injury here. I think as Your Honor pointed
16 out, Section 78 triple L 4 of the statute, specifically
17 defines customer property, which includes unlawfully
18 converted property, because I know the argument is that the
19 funds were stolen, and therefore don't constitute customer
20 property, and therefore are not within the purview of the
21 trustee's avoidance or jurisdiction or fiduciary duty to
22 recover that customer property.

23 But clearly they are, and the trustee has a duty
24 to recover customer property and clearly has standing as a
25 result. We also have a guidance in this case, the Rosen

Page 119

1 family decision by the Second Circuit specifically addressed
2 this issue of whether stolen property becomes property of
3 the customer property fund.

4 We also, Ms. Chaitman and I, I think a couple of
5 years back argued this very issue to Judge Rakoff, albeit in
6 the context of a motion to withdraw the reference, the Judge
7 in his decision, declined to withdraw the reference, but did
8 note that SIPA and the Bankruptcy Code work in tandem to
9 grant the trustee the authority to bring statutory avoidance
10 and recovery claims on behalf of the estate itself, citing
11 to 78 triple F 2(c)(3), and that's Picard v Roman, 2012 West
12 Law 5816849.

13 So I think the issue has been addressed a number
14 of times, Your Honor. Unless you have any questions, I'll
15 rest, thank you.

16 THE COURT: Thank you.

17 MS. CHAITMAN: Two things, Your Honor. Again, the
18 trustee cannot explain why he asserted that he had a quasi-
19 governmental immunity to producing documents, and it rests
20 not simply on his function as a SIPC trustee, but also on
21 his acceptance of an appointment as an agent of the federal
22 government in distributing funds. And that was in December
23 of 2010, at the very same time that he was filing all of
24 these complaints.

25 And I did find, it's actually on page 17, Your

Page 120

1 Honor, of my brief, and I'm quoting from *Raines versus Byrd*,
2 521 U.S. 811 at 820, "It is settled that Congress cannot
3 erase Article 3 standing requirements by statutorily
4 granting the right to sue to a plaintiff who would not
5 otherwise have standing."

6 And then in United --

7 THE COURT: Actually I have a question for you,
8 though. If what you're arguing is that provision is
9 unconstitutional, don't you have to give notice to the
10 Attorney General?

11 MS. CHAITMAN: No, I'm not arguing that the
12 provision --

13 THE COURT: Well, but the provision that we're
14 talking about (c)(3) gives standing -- Mr. Cremona, please
15 -- gives standing to Mr. Picard in this case to bring these
16 actions. And as I understand your argument, that is a
17 violation of Article 3 of the Constitution; is that right?

18 MS. CHAITMAN: It's a violation of -- yes.

19 THE COURT: And the law is clear that if you're
20 asserting that a provision of a statute of Congress is
21 unconstitutional, you have to give notice to the Attorney
22 General and the U.S. Attorney, so that they can come in and
23 defend the provision.

24 MS. CHAITMAN: I do not believe that is done in
25 each of the cases that I cite on page 17 of my brief.

1 THE COURT: But that's what the law is.

2 MS. CHAITMAN: Because -- no, but what -- because
3 it comes up as a challenge to the standing by a private
4 litigant, and --

5 THE COURT: But he has standing but for the --
6 you're telling me the unconstitutionality of this provision.

7 MS. CHAITMAN: Well, what I'm saying is, he
8 doesn't have Article 3 injury, and his defense is that he
9 has a statute, and the Supreme Court has made clear, again,
10 quoting another case, "a statute cannot obligate the Article
11 3 minima." And that's *Gladstone Realtors versus Village of*
12 *Bellwood*, 44 U.S. 91.

13 THE COURT: You should look at 28 U.S.C. 2403(b).
14 I think you have to give notice so that the Attorney General
15 can come in and defend a statute.

16 MS. CHAITMAN: I'll take a look at that, Your
17 Honor.

18 THE COURT: Okay.

19 MS. CHAITMAN: And if necessary, I will do that.

20 THE COURT: I believe it's also in the Federal
21 Rules of Civil Procedure.

22 MS. CHAITMAN: Okay. But what my argument is, I'm
23 not particularly interested in voiding the statute, I'm
24 simply arguing that the --

25 THE COURT: Well, but --

1 MS. CHAITMAN: -- trustee lacks standing.

2 THE COURT: But you're saying the trustee lacks
3 standing because the statute is unconstitutional. The
4 statute clearly gives the trustee standing. Can we agree on
5 that?

6 MS. CHAITMAN: The statute does not give the
7 trustee Article 3 injury. What my argument is that the
8 trustee lacks Article 3 injury and he's --

9 THE COURT: Can he sue without Article 3 injury
10 under the statute?

11 MS. CHAITMAN: I do not believe he can.

12 THE COURT: Because it's a violation of Article 3?

13 MS. CHAITMAN: It's a violation of Article 3.

14 THE COURT: So the statute gives him the authority
15 to sue in violation of Article 3.

16 MS. CHAITMAN: He lacks standing.

17 THE COURT: Okay.

18 MS. CHAITMAN: Yeah, he lacks standing under
19 Article 3. If you feel it's necessary for me to do it --

20 THE COURT: But I'm just saying --

21 MS. CHAITMAN: -- in a differnet way, I -- yeah.

22 THE COURT: -- it sounds to me like you're arguing
23 that the statute's unconstitutional.

24 MS. CHAITMAN: I don't care about making the
25 statute unconstitutional, if the Supreme Court --

1 THE COURT: Well, if it's valid, he's got
2 standing. This is becoming circular.

3 MS. CHAITMAN: No, no, no, because the Supreme
4 Court well recognized it, that's what this line of cases
5 says.

6 THE COURT: Okay.

7 MS. CHAITMAN: All right. Thank you, judge.

8 THE COURT: Thank you.

9 MR. KELLY: Good afternoon again, Your Honor,
10 Nathaniel Kelly for SIPC. I just wanted to make a few
11 points in rebuttal to Mrs. Chaitman.

12 First of all regarding the trustee's role as a
13 special master for the distribution of the government -- the
14 funds.

15 Your Honor, a quasi-governmental -- being found to
16 be a quasi-governmental agent is a case by case
17 determination, very specific to the actions being taken.
18 So, I think we would dispute that -- well, even if the
19 trustee was a quasi-governmental actor in regards to his
20 temporary role as a special master for the distribution of
21 funds that doesn't make him a quasi-governmental actor with
22 regards to --

23 THE COURT: What does?

24 MR. KELLY: What's that?

25 THE COURT: What does? If he is administering a

1 restitution fund created I guess by the Department of
2 Justice what more would it take to be a quasi-governmental
3 actor?

4 MR. KELLY: Your Honor, I guess I would concede
5 that he may be in that case, but being a quasi-governmental
6 in this case does not make him a quasi-governmental actor in
7 all aspects of his job, and certainly not in aspects of the
8 trustee to the SIPA estate, which maintains separate funds
9 and maintains a separate pool of customer property.

10 I think as Mr. Cremona made clear, just to again
11 state the obvious, SIPC and the trustee are independent of
12 each other, and SIPC itself is a private non-profit, the
13 trustee is not its decision maker, and SIPC is not the
14 trustee's decision maker either.

15 The -- Ms. Chaitman quotes -- quotes -- provides a
16 couple quotes in her briefs trying to assert that the
17 trustee is the decision maker for SIPC, such as she quotes
18 the SEC -- SEC chairwoman who states that the trustee and
19 not the SEC makes the decision to recover false profits.
20 That quote in no way indicates that the trustee is making
21 the decision for SIPC.

22 THE COURT: It's also well beyond the record.

23 MR. KELLY: Yes.

24 THE COURT: It appears so.

25 MR. KELLY: Let's see. If you'll give me one

1 second, Your Honor, I think that may be all I had.

2 (Pause)

3 MR. KELLY: That's it, Your Honor. That's all I
4 had.

5 THE COURT: Thank you.

6 MR. KELLY: Thank you.

7 THE COURT: Are there any other issues?

8 MR. BERNFELD: Good afternoon, Your Honor --

9 THE COURT: Good afternoon.

10 MR. BERNFELD: -- my name is Jeffrey Bernfeld of
11 Bernfeld Dematteo & Bernfeld.

12 I'm going to be arguing three issues, two of which
13 are intertwined, and I would argue first and then let
14 Mr. Cremona address those, and then I'd like to do the third
15 one, which is somewhat separate.

16 THE COURT: Go ahead. What are the two issues?

17 MR. BERNFELD: The first two issues that are
18 intertwined have to do with (a), our contention that these
19 adversary proceedings should have been filed in the district
20 court first in order for any subject matter jurisdiction to
21 attach in this court, and (b), that the summons that were
22 issued on the adversary proceedings are defective for a
23 number of reasons, the first being that this Court hadn't
24 obtained subject matter jurisdiction at the time that they
25 were issued, and (b), that the summons themselves have an

1 affirmative misstatement of the law, which goes to the very
2 core of what a summons is.

3 So let me start with the court issue.

4 It is very clear and well settled that the
5 bankruptcy court does not have its own independent subject
6 matter jurisdiction over --

7 THE COURT: Right, it belongs to the district
8 court.

9 MR. BERNFELD: -- over these sorts of issues.
10 Right. And the -- this was crystallized in the Stern case
11 and the related cases too.

12 THE COURT: The Stern case wasn't a subject matter
13 jurisdiction case, it was an division of labor case.

14 MR. BERNFELD: Understood, but it's very clear
15 from the statute, and what I really meant to say was that
16 the issue became crystallized.

17 THE COURT: Okay. Why don't I have subject matter
18 jurisdiction when we had a standing order of reference under
19 which the district court referred all of its bankruptcy
20 jurisdiction to the bankruptcy court?

21 MR. BERNFELD: If that standing order of reference
22 was to cover everything then there would be no need for
23 bankruptcy petitions or other items to be first -- or SIPC
24 liquidations for that matter to be first filed in the
25 district court and then referred.

1 THE COURT: Well, first of all, bankruptcy
2 petitions are filed here, and SIPC liquidation proceedings
3 are filed in the district court because that's what SIPA
4 says.

5 MR. BERNFELD: Understood.

6 THE COURT: And then they have to be referred by
7 the district court to the bankruptcy court.

8 MR. BERNFELD: Understood.

9 THE COURT: So the fact that SIPA is filed in the
10 district court and everything else is filed here it's not
11 dispositive of anything.

12 MR. BERNFELD: Understood, but what we have here
13 is if you look at the order of reference that referred the
14 liquidation proceeding to this Court it does not mention
15 related adversary proceedings. The statute says that
16 proceedings that are related to Title 11, that the district
17 court has original jurisdiction on.

18 It's certainly clear that the district court, if
19 it wished to, could retain jurisdiction over adversary
20 proceedings that -- such as the ones we're talking about
21 here, that they're not required to. There may be a standing
22 order that is a policy of the district court, but the
23 district court is certainly not required to by statute or
24 otherwise.

25 So the point is that the bankruptcy court -- well,

1 we argued that absent a specific referral of a proceeding
2 from the district court to the bankruptcy court, that the
3 bankruptcy court does not obtain jurisdiction.

4 THE COURT: Just in this case or in all cases?

5 MR. BERNFELD: In all adversary proceedings -- at
6 least this is our argument -- that in all adversary
7 proceedings such as -- in all adversary proceedings that
8 this Court cannot render a final judgment in, it seems very
9 clear to us --

10 THE COURT: I don't understand that argument, I
11 have to tell you.

12 MR. BERNFELD: Okay.

13 THE COURT: Putting aside this case and your
14 reference to the district court's order of reference in this
15 case, which I don't have before me --

16 MR. BERNFELD: I --

17 THE COURT: -- the district court has referred all
18 of its jurisdiction in cases and proceedings to this Court,
19 in all matters, in all bankruptcy matters. So what's --
20 what's the jurisdictional issue?

21 MR. BERNFELD: The jurisdictional issue is that
22 while there has been an order of reference referring the
23 SIPC liquidation to this Court there has been no order
24 referring these adversary proceedings from the district
25 court to the bankruptcy court --

1 THE COURT: So your argument is that the general
2 order of reference does not apply to the proceedings in this
3 case.

4 MR. BERNFELD: My argument is the general order of
5 reference does not -- the general order -- the general
6 standing order does not confer jurisdiction over specific
7 adversary proceedings that are related to this SIPC
8 litigation.

9 THE COURT: But just this SIPC litigation, or are
10 you talking about all bankruptcy cases?

11 MR. BERNFELD: In this context I'm just talking
12 about SIPC, I'm don't -- I'm not rendering a -- I'm not
13 rendering an opinion in terms of what the other bankruptcy
14 cases are because it really doesn't have to do with this
15 case and it's not what my clients are wrapped up in, so I
16 haven't really given that particular thought or -- or
17 research.

18 But what we have here, and I think again, my
19 argument is that Stern crystallized the issue.

20 Subject matter jurisdiction is generally tied to
21 the ability of a court to render a final judgment. If you
22 take that together with the --

23 THE COURT: That's not true though. That's not a
24 correct statement of the law.

25 MR. BERNFELD: I --

1 THE COURT: I have subject matter jurisdiction at
2 a minimum, and putting to one side your argument about the
3 reference, to make finding -- render report and
4 recommendation in every one of these cases.

5 MR. BERNFELD: Understood, I misspoke.

6 THE COURT: I just don't have subject matter -- or
7 I don't have the authority to enter a final judgment unless
8 -- unless in certain circumstances.

9 MR. BERNFELD: Right. Let me restate that.

10 Independent subject matter jurisdiction does not -- usually
11 will attach to the ability of a court to render a final
12 judgment in a particular case.

13 This Court does not have independent subject
14 matter jurisdiction over these adversary proceedings absent
15 a reference from the district court.

16 And I think the issue is made very, very clear as
17 we look at the summons that were issued, and that sort of
18 again leads into how it's intertwined.

19 The summons that was issued says that the failure
20 to timely answer is an implied consent to the clerk of this
21 court entering a final judgment by this Court by the fall.

22 That is --

23 THE COURT: The supreme court may decide that
24 that's right. That's before the supreme court now.

25 MR. BERNFELD: Well, understood, but as the law

1 currently stands given the Stern decision and Rakoff's
2 further decision on it, as things stand right now this Court
3 does not have the power to render -- to do what the summons
4 says it's going to do.

5 THE COURT: Did your clients -- has a default been
6 entered against your clients by this Court?

7 MR. BERNFELD: No.

8 THE COURT: So.

9 MR. BERNFELD: Well, I -- we're not talking about
10 a --

11 THE COURT: Whose rights are you asserting then?

12 MR. BERNFELD: Whose rights am I asserting? I'm
13 asserting the rights of my clients and any defendant in
14 these proceedings. Because we're not talking about a minor
15 -- we're not talking about somebody spelled a parties' name
16 wrong, we're not talking about someone accidentally did a
17 typo on the date, we're talking about the core purpose of
18 the summons.

19 The core purpose of the summons, in addition to
20 imparting information, is that a court is telling somebody
21 you come to court or else.

22 And what I'm telling you -- what I'm arguing here
23 is that the or else that these summons say is not an or else
24 that as things stand right now this Court can do. If, for
25 example, the summons said come to court or make an

1 appearance within 30 days or we're going to send people to
2 set your house on fire that would not be a valid summons.

3 THE COURT: And I would agree with you.

4 MR. BERNFELD: Okay. So my argument here is while
5 not as extreme --

6 THE COURT: Well, it might be a valid summons, but
7 I couldn't do anything about it, just so the record is
8 clear.

9 (Laughter)

10 MR. BERNFELD: Understood. But I would argue to
11 you and I would submit to you that a summons that says make
12 an appearance or else and the or else is something that the
13 Court is not empowered to do is not a summons that is a
14 valid summons.

15 THE COURT: Let me get off this summons --

16 MR. BERNFELD: Sure.

17 THE COURT: -- and go back to your reference
18 argument. I'm looking at the statute -- it's hard to find
19 where these -- the versions begin -- I guess it's 78eee, it
20 looks like subsection (b), subparagraph (4), which says that
21 upon removal of the SIPC proceeding to this Court this
22 Court, quote, "shall there upon have all of the
23 jurisdiction, powers, and duties conferred by this chapter
24 upon the Court to which the application for issuance" -- I
25 note parenthetically the district court -- "of the

1 protective decree was made." So I have all of the authority
2 of the district court.

3 MR. BERNFELD: But we -- we know that --

4 THE COURT: And maybe I can't enter a final
5 judgment, but --

6 MR. BERNFELD: That's an important part of the
7 authority of the district court.

8 THE COURT: But it's not, it has nothing to do
9 with subject matter jurisdiction. If I don't have -- as a
10 matter of fact the standing order of reference now provides
11 that if I enter what I think is a final judgment and I
12 didn't have the authority to do it the Court will just treat
13 it as a proposed findings of fact and conclusions of law.

14 MR. BERNFELD: Understood, Your Honor, but that's
15 not what -- I don't believe that's what the standing order
16 said at the time, and the order of reference --

17 THE COURT: The standing order -- no, it didn't
18 say it at the time, but that's what it says now. Are you
19 saying it's not retroactive?

20 MR. BERNFELD: No, I would argue that a standing
21 order that's talking about what's going to happen going
22 forward would not be retroactive to a time that -- back to
23 2010 when these summons were issued.

24 THE COURT: Do you have any authority for that
25 proposition?

1 MR. BERNFELD: No, I don't.

2 THE COURT: Okay. Good.

3 MR. BERNFELD: But the point that I'm making is
4 that, you know, under 1334 it's very clear that the
5 bankruptcy court's jurisdiction is derivative. And even
6 earlier in the arguments --

7 THE COURT: I'm not arguing with you, and it's --
8 but under I think 28 U.S.C. 157(a) the bankruptcy -- the
9 district court can refer its jurisdiction to the bankruptcy
10 court, which is --

11 MR. BERNFELD: And I --

12 THE COURT: -- why 90 jurisdictions have orders of
13 reference for that.

14 MR. BERNFELD: And I absolutely agree that the
15 district court can do that. What I'm saying --

16 THE COURT: And every district court has.

17 MR. BERNFELD: I agree with you, and if they come
18 up with new district courts they'll have that power too.

19 But what I'm arguing is that the district court
20 has not done that in these adversary proceedings.

21 THE COURT: What about the statute I just read to
22 you?

23 MR. BERNFELD: Well, I think that if we look at --
24 again, that's why I said that Stern, while it doesn't speak
25 directly to the issue, crystallized the issue, because that

1 statute says that this Court has all of the powers of the
2 district court, and if you look at Stern and what has
3 happened since Stern this Court does not have all the powers
4 of the district court.

5 THE COURT: Okay. And if you look at Arkinsin
6 (ph) it said that when the code says I can enter a final
7 judgment that I can't, that means I can render, you know, a
8 recommended findings and conclusions. So that's all I can
9 do.

10 MR. BERNFELD: Understood. Understood.

11 THE COURT: So what are we talking about?

12 MR. BERNFELD: What we're talking about is subject
13 matter jurisdiction and when and if it has been conferred
14 upon this Court, and our argument is that the order
15 referring the SIPC liquidation to this Court did not refer
16 subject matter jurisdiction over adversary proceedings that
17 had not yet been brought that are adversary proceedings that
18 in addition this Court doesn't have the power to render
19 final judgments over.

20 THE COURT: What about the ones that I do?

21 MR. BERNFELD: The ones that you do, that might be
22 a different story, but again, I'm not -- I haven't moved
23 about those and I'm not arguing about those.

24 What I'm arguing about is these specific adversary
25 proceedings, which certainly could have been filed in the

1 district court, and if they came before the judge a judge
2 could look at it and say, you know what, I'm not going to
3 refer this.

4 THE COURT: But why -- but the district court
5 wouldn't have jurisdiction because the jurisdiction has been
6 referred here and the district court would have to withdraw
7 the reference.

8 MR. BERNFELD: Well, I respectfully disagree the
9 jurisdiction has been conferred here, because all that's
10 been conferred here is jurisdiction over the overall
11 liquidation and not these specific adversary proceedings
12 where --

13 THE COURT: That's not what the statute says.

14 MR. BERNFELD: Understood, but as we just -- or as
15 I just asserted any way, that that statute is not completely
16 accurate, particularly when it comes to the rendering of a
17 final judgment.

18 So, I would argue that when we are looking at that
19 more critically, particularly through the lens of what has
20 evolved since Stern, that what we have to look at is what
21 actually has been conferred and when. And I submit to you
22 that jurisdiction has not yet been conferred over these
23 adversary proceedings, that the trustee should have filed
24 these adversary proceedings in district court where a proper
25 summons, that had a proper statement of the law, and said

1 make an appearance or else, and the or else was a valid or
2 else, our -- was necessary first. I don't believe that --
3 well, I don't get into that.

4 But the order referring the proceeding over here
5 did not at any -- in any one of its lines mention or even
6 hint at the adversary proceedings, it didn't talk about
7 related proceedings, didn't talk about anything, it said I'm
8 referring this liquidation over, and here's the trustee, and
9 here are the stays, and here are the other items, but it did
10 not say and the bankruptcy court shall have jurisdiction to
11 issue summons and conduct adversary proceedings,
12 particularly on adversary proceedings that the bankruptcy
13 court does not have the power to render a final judgment on.

14 With respect to the summons, in addition to the
15 facial misstatement of the law related to my first argument,
16 if this Court didn't have subject matter jurisdiction yet
17 conferred upon it then the issuance of the summons itself is
18 a nullity.

19 The last thing I would like to say is we made this
20 argument both with respect to the reference of the adversary
21 proceedings and the summons, the arguments were -- with
22 respect the exception of a footnote regarding the summons
23 were completely ignored by the trustee and by SIPC, and on
24 that basis alone they've waived any opposition to it.

25 So on that basis alone at a minimum the 11 cases

1 that I have moved on today and all of the other cases that
2 have joined in everybody's issues, it should be granted to
3 that extent, and I submit to you it should be granted on the
4 substance as well.

5 I'm going to come back up on the separate issue
6 after --

7 THE COURT: What's your separate issue?

8 MR. BERNFELD: The separate issue has to do with
9 the formation of BLMIS LLC.

10 THE COURT: Okay. Mr. Cremona?

11 MR. CREMONA: Thank you, Your Honor. Nick Cremona
12 again on behalf of the trustee. I'll be quick.

13 I think Mr. Bernfeld's argument fails for a number
14 of reasons.

15 In the first instance I can hand up to Your Honor
16 the -- Judge Stanton's order, which I have a copy of.

17 As Your Honor pointed out I'll direct you to
18 paragraph 9 of that order, which specifically refers to
19 section 78eee9b0(4) and says "that this liquidation
20 proceeding is removed to the United States Bankruptcy Court
21 for the Southern District of New York."

22 So this liquidation proceeding pursuant to SIPA,
23 was commenced in the district court as of December 16;
24 however, this order was entered as of December 15, 2008.
25 This Court has subject -- this Court's subject matter

1 jurisdiction emanates from that order. You have subject
2 matter jurisdiction over this entire liquidation proceeding
3 pursuant to that order and SIPA.

4 Every adversary proceeding in this case that has
5 been commenced, as Your Honor is well aware, was commenced
6 within this liquidation proceeding, and the jurisdiction
7 over those adversary proceedings emanates from the
8 jurisdiction over the entire proceeding.

9 As a second matter the argument fails as Your
10 Honor pointed out. In the first instance I think it fails
11 to take into account 28 U.S.C. 157(a) and how it operates
12 and how on the automatic referral to the bankruptcy court,
13 that is -- you add to that, as Your Honor pointed out, the
14 amended standing order of reference, which is dated
15 February 1, 2012 and was clarified to address I think we
16 would all agree some Stern issues, but again, that has no
17 bearing on subject matter jurisdiction.

18 I think the argument also fails because in this
19 very case we had a consolidated proceeding that deals with
20 the effects of Stern v. Marshal and its effects on the
21 adversary proceedings herein, and Judge Rakoff concluded
22 that all of the adversary proceedings should be sent back to
23 Your Honor, Your Honor can adjudicate the matters and issue
24 findings and conclusions, but not final determinations
25 except in the certain limited circumstances as Your Honor

1 pointed out. For example, if there was a 502(d) claim. I
2 think it fails for that reason.

3 Lastly, I think it fails because Mr. Bernfeld
4 filed motions to withdraw the reference in 11 cases, clearly
5 understood that the reference between the courts -- the
6 reference was withdrawn in 11 of his cases, and most
7 recently on August 1st, Judge Rakoff issued an order which
8 candidly was an order out of an abundance of caution to make
9 clear to all parties that every single motion to withdraw
10 the reference that had not been granted was in fact denied,
11 and that order was entered in every single adversary
12 proceeding, and that order specifically says that the cases
13 are sent back before Your Honor.

14 So in those four different ways Your Honor has
15 subject matter jurisdiction and these cases --

16 THE COURT: What was the date of that order?

17 MR. CREMONA: August 1, 2014. And it is still
18 trickling in on dockets, but it is going to be entered in
19 every single adversary proceeding as per our conference with
20 the Court.

21 THE COURT: Okay.

22 MR. CREMONA: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. BERNFELD: If I might just briefly reply to
25 that before I get on to the next issue.

1 In the first instance the Court should disregard
2 the arguments because this is opposition to a motion that I
3 haven't had a chance to reply to, and in the alternative I
4 should be given a chance to at least submit a letter
5 addressing the couple of orders that Mr. Cremona mentioned.

6 THE COURT: Okay.

7 MR. BERNFELD: Secondly, Mr. Cremona's arguments
8 beg the question. Either 78eee(b)(4) grants this Court the
9 ability to issue summons on adversary proceedings or it does
10 not. Either it had been conferred under this order or it
11 was not.

12 I suggest that what we're saying here is under 15
13 U.S.C. 78eee(b)(4) this liquidation proceeding is removed to
14 the United States Bankruptcy Court. It doesn't say this
15 liquidation proceeding and all related proceedings
16 whereas --

17 THE COURT: There were no -- but there were no
18 related proceedings at the time.

19 MR. BERNFELD: And you just made by next point.
20 How can an adversary --

21 THE COURT: Since I made it why don't you go on to
22 the one after that.

23 MR. BERNFELD: I'm just going to -- just going
24 clarify for one moment.

25 How can the district court refer an adversary

1 proceeding that had not yet existed at the time that -- of
2 this referral?

3 Now, with respect to my -- my firm and my clients
4 and many, many others availing themselves of the withdrawal
5 of reference statute, first of all it was the only procedure
6 available to us, but second of all it again really is not
7 relevant, because if the -- if what we conclude is that the
8 district court had not referred it and had not conferred
9 subject matter jurisdiction I can't waive that by moving to
10 withdraw the reference or by conceding it. I can't create
11 subject matter jurisdiction. So that's it on that.

12 I would move on to the next question, and while we
13 have the order out that's exactly what we're talking about.
14 The order is talking about the liquidation of Bernard L.
15 Madoff Investment Securities LLC and its customers. Bernard
16 L. Madoff Securities LLC is an entity that came into
17 existence in January of 2001 based on the allegations
18 contained in the trustee's complaint, and you know, I have
19 an example here where they say:

20 "Founded in 1959, BLMIS began operations as a sole
21 proprietorship of Madoff, and later, effective January 2001,
22 formed as a New York limited liability company wholly owned
23 by Madoff."

24 I suggest to the Court that all the trustee has
25 been authorized to deal with is our transactions involving

1 -- just to abbreviate it -- BLMIS LLC, not what they have
2 defined as BLMIS, which is everything that Mr. Madoff has
3 done since 1959.

4 THE COURT: But the trustee is only suing for
5 transfers at this point within two years of the filing date.

6 MR. BERNFELD: But he's delving past January 2001,
7 and in effect avoiding or netting out accounts from what is
8 a completely separate entity.

9 If Mr. Madoff had been --

10 THE COURT: Well, how is that different from these
11 inter accounts -- you know, the inter account transfer cases
12 that I have?

13 MR. BERNFELD: Well, inter account transfers are
14 where I as a customer am sending some of my Madoff money to
15 customer B into their account. What I'm talking about is
16 not whether or not in that context with two BLMIS LLC
17 accounts that happened post-2001 that you can't look at the
18 net equity there, what I'm saying is that the trustee has no
19 authority to go beyond January 2001 for anything because
20 there did not exist a BLMIS LLC, which is the only thing the
21 trustee has been empowered to liquidate.

22 The trustee has had six years, the trustee could
23 have moved at any time to expand the definition, to amend
24 the order, to do anything he could to go back to 1959. If
25 Mr. Madoff had been at Merrill --

1 THE COURT: But didn't the second circuit
2 implicitly approve that in the net equity decision?

3 MR. BERNFELD: I don't believe they did. I think
4 that what has been said is you can go in and net out your
5 cash in and cash out.

6 What I'm saying is they can't do that past January
7 2001, because BLMIS LLC, the only entity that the trustee
8 has been empowered to liquidate and address, did not exist
9 prior to January 2001.

10 If Mr. Madoff had been at another brokerage firm
11 and was somehow unbeknownst to his employers stealing money
12 from his customers and then he formed BLMIS LLC, would we
13 say that the trustee has the right to go to Merrill or
14 wherever they were -- wherever that broker was working and
15 now undo and avoid transactions that occurred prior to the
16 formation of the entity that they are -- that they are
17 empowered to liquidate? I submit that the answer is no.

18 The only difference here being that Mr. Madoff
19 didn't come from another brokerage house owned by other
20 people, he came from a brokerage house owned by him and then
21 formed another brokerage house owned by him.

22 Had he -- so, I think that the argument I'm making
23 is -- it may be technical in nature, but this case has
24 revolved around technicalities. Like what you were just
25 talking about with the account to account transfers, if

Page 145

1 grandma wants to give money out of her Madoff account to two
2 of her grandchildren, if she did it by withdrawing and
3 sending a check to one and transferring to another, the guy
4 who got the check gets to keep his money and the one who got
5 the inter account transfer does not. That's -- we've argued
6 that that's form over substance and shouldn't happen, the
7 courts have disagreed, but you know, so if we're going to be
8 technical about those sorts of things I think we have to be
9 technical about this. The order says what it says.

10 You can -- the customers of Bernard L. Madoff
11 Securities LLC are in need of protection, does not give the
12 trustee any authority to go past or to deal with any entity
13 other than Bernard L. Madoff Securities LLC. It's in their
14 complaints, it's in the order, and nothing has been done to
15 seek to expand or address that.

16 So our argument is -- or my argument is on behalf
17 of my clients and whoever else has joined in the argument,
18 that any transactions, accounts, statements that predate
19 this formation of BLMIS LLC are not the proper subject for
20 this liquidation or the trustee's activities.

21 THE COURT: Thank you.

22 MR. CREMONA: Your Honor, I would agree with one
23 thing that Mr. Bernfeld said came to mind, I think it's a
24 hyper technical argument that he's making.

25 The fact of the matter is our complaints allege

1 that BLMIS began operating in 1959 and that proposition
2 should be accepted as true for the purposes of a motion to
3 dismiss.

4 THE COURT: But he's saying it's a different
5 entity than BLMIS LLC, which is the entity that the trustee
6 has been appointed for liquidating.

7 MR. CREMONA: Uh-huh.

8 THE COURT: He also said that if fictitious
9 profits had been taken from a Merrill Lynch account under
10 some other sham let's say --

11 MR. CREMONA: Right.

12 THE COURT: -- and put into a BLMIS LLC account
13 you couldn't do what you've done in this particular case,
14 and the pre-2001 account is the same as the Merrill Lynch
15 account.

16 MR. CREMONA: Understood, Your Honor, but the
17 reality is that's not what happened here and that's what we
18 have to deal with, right? BLMIS the accounts at issue are
19 all the same and they were the same over the life of the
20 company.

21 THE COURT: Is that alleged in the complaint?

22 MR. CREMONA: I believe so. I would have to
23 verify that.

24 But I guess where I was going, Your Honor, is that
25 the trustee is appointed to recover customer property. The

1 customer property is what was in the accounts of the debtor,
2 and those accounts were the same, the customer -- it's based
3 on the business of the debtor entity, and that business
4 remained the same, the bank accounts into which the customer
5 property was deposited, and then ultimately fraudulently
6 transferred remained the same over the life of the entity.
7 So the trustee is in essence recovering customer property.

8 Whether there's a technical name change at a
9 certain point I don't think alters whether that's customer
10 property, and I do think it's a -- it is a hyper technical
11 argument.

12 And really, I think under 78fff(2)(c)(3) the only
13 two relevant issues to determine the trustee's authority to
14 bring these actions are whether the trustee is appointed the
15 estate representative, which he is, and whether the funds
16 the trustee seeks to recover would have been customer
17 property but for the fraudulent transfer, which they are.

18 THE COURT: But you're netting withdrawals from a
19 pre-2001 account against deposits made into a post-2001
20 account conceivably, right?

21 MR. CREMONA: Yes, but the account remained the
22 same, presumably, with the same entity dealing with the same
23 business.

24 THE COURT: Well, I saw that in SIPC's response,
25 but is that alleged in the complaint? Ask you the same

1 questions I've asked the defendants in this case.

2 MR. CREMONA: I can take a look, Your Honor.

3 (Pause)

4 MR. CREMONA: I'm sorry, Your Honor, if you could
5 just bear with me.

6 (Pause)

7 MR. CREMONA: For example, Your Honor, in
8 paragraph 23 of this complaint we state:

9 "Founded in or around 1959 BLMIS began its
10 operations as a sole proprietorship of Madoff, and later
11 effective January 2001 formed a New York limited liability
12 company wholly owned by Madoff."

13 So I do think we reference the prior entity.

14 Since -- "In or about 1986 BLMIS operated from its principal
15 place of business."

16 Again, which Madoff is the founder and sole -- and
17 proprietor, chairman, and chief executive.

18 THE COURT: What paragraph were you just reading?

19 MR. CREMONA: I was -- I can give you a copy, Your
20 Honor. I was reading from paragraph 23, which is the -- of
21 the amended complaint. Do you want me to hand up a copy?

22 THE COURT: I can look at it. I was just -- I'm
23 looking at a different complaint that I happen to have up on
24 the screen.

25 MR. CREMONA: It's under the title of the

1 fraudulent Ponzi scheme.

2 THE COURT: Oh, I see. Okay. All right.

3 MR. CREMONA: I also -- I agree with -- Your Honor
4 mentioned, I think it's implicit in looking at the net
5 equity decision and antecedent debt, which both validate the
6 net investment method, which goes back and nets deposits and
7 withdrawals over the life of the account.

8 And specifically as we've discussed previously,
9 Your Honor, in the context of inter account transfer in the
10 Fishman (ph) case, clearly there's no limitation on 546(c)
11 and we're entitled to go back, and that is what the
12 antecedent debt decision provides, which is consistent with
13 the net investment method and the net equity decision.

14 I have nothing further unless Your Honor --

15 THE COURT: Thank you. No.

16 MR. BERNFELD: If I could have a brief minute,
17 Your Honor.

18 THE COURT: Yes.

19 MR. BERNFELD: I think Mr. Cremona's argument begs
20 the question. Over the life of the account, what account
21 are we talking about? An account of BLMIS LLC, or an
22 account that also was part of BLMIS LLC's predecessor?

23 The -- if we -- you know, he read the same
24 paragraph that I was looking at and let's take it as true.
25 What they define as BLMIS, which I guess is Mr. Madoff's

1 professional operations as a securities -- in his securities
2 career, may have begun in 1959, let's accept that as true.
3 But in 2001 the New York limited liability company, that is
4 the only thing mentioned in the order, is what was formed.

5 So we're taking their allegations, we're taking
6 the order as it was, and we're simply saying prior to
7 January 2001 the authority conferred by the order -- there
8 is no authority conferred by the order and there is no order
9 conferring authority by this trustee to go back to deal with
10 the predecessor entity.

11 I assume they could have argued that at the time
12 that there was a predecessor entity that's really one in the
13 same and they would have to meet a certain burden, which
14 they haven't argued and they haven't done. They haven't
15 really even argued it in the complaint, but regardless, even
16 if one could argue that in the complaint generally here the
17 trustee's authority to act is strictly limited by the order,
18 and the order only refers to that New York LLC, it does not
19 refer to a predecessor entity, and if there had been several
20 predecessor entities, you know, it just does not confer that
21 authority.

22 So, unless you have further questions I have
23 nothing further.

24 THE COURT: No, thank you.

25 MR. BERNFELD: Thank you.

1 MR. KELLY: Your Honor, Nathaniel Kelly for SIPC.

2 I just have one quick point to make.

3 SIPA speaks in terms of the debtor and the
4 debtor's books in calculating the net equity based upon the
5 debtor's books and records recovering transfers of the
6 debtor. It defines the debtor as a SIPC member -- as the
7 SIPC member put into liquidation. That's 78111, subsection
8 (5), I believe.

9 In this case BLMIS both as -- whether -- both as a
10 sole proprietorship and as the LLC is the SIPC member. The
11 change --

12 THE COURT: How do I know it's the same member?

13 MR. KELLY: Well that is -- I think it's under --
14 it's in -- as alleged in the complaint there -- the
15 complaint refers to BLMIS as a sole proprietorship of Madoff
16 and later the LLC, and then says BLMIS was -- meaning both
17 of them -- was registered with the SEC, and by that
18 registration BLMIS is a member of SIPC. So since -- since
19 SIPC's foundation in 1970, BLMIS both has been the same SIPC
20 member. And so the SIPA allowed the calculation of net
21 equity and everything entails based upon the debtor as a
22 SIPC member.

23 THE COURT: Thank you.

24 MR. BERNFELD: Thirty seconds, that's --

25 THE COURT: Just to respond to that.

1 MR. BERNFELD: Just to respond to that.

2 The complaint may say BLMIS, as they broadly
3 define it, was registered with the SEC and by that
4 registration BLMIS is a member of SIPC. The complaint
5 doesn't say when it happened, it doesn't say that the sole
6 proprietorship is the same thing as the LLC, it doesn't say
7 that there was ever a distinction, it doesn't even say if
8 perhaps that happened post-LLC.

9 So I would submit if they're going to rest on that
10 then their complaint is not sufficiently pled.

11 THE COURT: Thank you.

12 MR. BERNFELD: Yeah, the introductory paragraph of
13 the complaint admits this completely, "That Irvin Picard, as
14 trustee for the liquidation of the business of Bernard L.
15 Madoff Investment Securities LLC," and defines that as
16 BLMIS.

17 So when they say BLMIS was registered with the SEC
18 as a securities broker dealer under Section 15 and so forth,
19 and by that registration BLMIS is a member of SIPC, under
20 the allegations of the complaint they're only talking about
21 LLC.

22 So, unless you have a question I have nothing
23 further.

24 THE COURT: No. Thank you.

25 Are there any other issues? Yes, sir?

1 MR. KLEINHENDLER: Thank you, Your Honor. My name
2 is Howard Kleinhendler from Wachtel Missry, I represent ten
3 actions that are currently pending before Your Honor, and
4 I've got two issues that overlap, and that is I have moved
5 to dismiss under 12(b)(1) for a lack of standing because the
6 trustee has already marshaled enough assets to satisfy all
7 alleged customer claims.

8 THE COURT: How do you figure that?

9 MR. KLEINHENDLER: According to the trustee's
10 reports to this Court, which are in my papers, and according
11 to his websites that he's posted, which are in my papers, he
12 alleges as follows. He has recovered 9.5 billion in cash
13 that he has at the bank, in addition the Madoff victims fund
14 has reported to have 4.43 billion, that --

15 THE COURT: What's the relevance of the Madoff
16 victim fund?

17 MR. KLEINHENDLER: Because the Madoff's victims
18 fund has alleged in their literature, and that's also in the
19 -- that a majority of funds will be going to Madoff
20 investors that have -- that are net losers. that no --

21 THE COURT: But doesn't that include indirect
22 investors also?

23 MR. KLEINHENDLER: Well -- well --

24 THE COURT: So, for instance, people who invested
25 in feeder funds?

1 MR. KLEINHENDLER: But we don't -- we don't know
2 yet where that money is going.

3 THE COURT: So how can I know if there's enough
4 money if I don't know what the size of those claims are?

5 MR. KLEINHENDLER: Well, that goes to the next
6 point I want to make, which is --

7 THE COURT: How much are the amount of claims in
8 this case?

9 MR. KLEINHENDLER: He has asserted that the amount
10 of claims are total of 11.4 billion.

11 THE COURT: Okay. So assuming you're right,
12 you're implicitly arguing and that's an issue that I have to
13 decide, whether you look at the time that the SIPC
14 proceeding was filed or the time when the complaints were
15 filed or today, assuming that I have to look at whether the
16 estate is insolvent today, how do you show, based upon the
17 allegations in the complaint or the other documents that I
18 can consider on a motion to dismiss, that the estate is
19 solvent?

20 MR. KLEINHENDLER: Okay. Now --

21 THE COURT: Since the trustee alleges it's
22 insolvent.

23 MR. KLEINHENDLER: On --

24 THE COURT: And from what they've just told me it
25 is insolvent.

1 MR. KLEINHENDLER: Right. On a 12(b)(1) you're
2 not limited to what's in the complaint. This is a 12(b)(1)
3 standard.

4 THE COURT: Okay.

5 MR. KLEINHENDLER: You are -- you are allowed to
6 look at everything I've put before you, and --

7 THE COURT: So how much are the claims of the
8 feeder fund investors that share in this victims fund?

9 MR. KLEINHENDLER: Well, I have no idea.

10 THE COURT: So how can I dismiss a complaint --

11 MR. KLEINHENDLER: He -- well, one second.

12 THE COURT: -- when there's a -- listen to me --
13 when there's a billion dollar shortfall and I don't know
14 what the share of the customers -- the share of that victims
15 fund the customers are going to get?

16 MR. KLEINHENDLER: Right. So that's the second
17 prong of what I'm asking you to do is to stay, and I have to
18 motion -- it's a twin motion. If you don't want to dismiss
19 because we don't know how much the Madoff victim fund is
20 going to give to customers of this SIPA estate, and I assume
21 there's no dispute that if a customer in the SIPA estate
22 gets money from the Madoff fund they are not going to be
23 able to maintain their claim here to the extent of the money
24 they receive from the Madoff victims fund.

25 So my point is, because the -- and, Your Honor,

1 let me just make another point that I want -- in the
2 trustee's motion to approve the JP Morgan settle, which is
3 half of the money that went to the Madoff victims fund, the
4 trustee said to this Court, that the money is going to be
5 used to pay Madoff net losers.

6 THE COURT: But that includes indirect investors.
7 There's no question that people who got more than they
8 invested --

9 MR. KLEINHENDLER: True. True.

10 THE COURT: -- they're not going get anything from
11 any fund.

12 MR. KLEINHENDLER: True.

13 THE COURT: And the victims fund is only going to
14 pay net losers just as Mr. Picard proposes to do.

15 MR. KLEINHENDLER: Correct.

16 THE COURT: But the victims fund will also pay net
17 losers who had no claim as customers in this case.

18 MR. KLEINHENDLER: But we don't know yet. As we
19 sit here today -- this is what I'm positing to this Court.
20 If -- assume for the moment that all the net -- the net
21 losers, and there's only a \$2 billion shortfall right now
22 between --

23 THE COURT: Pretty soon you're talking about real
24 money, huh?

25 MR. KLEINHENDLER: There's \$2 billion that

1 Mr. Picard says he needs to make all of the claims that he's
2 recognized whole. There's four and a half billion sitting
3 in the Madoff victims fund. If the Madoff's victims fund
4 decides that we're going first pay all of the net losers in
5 the SIPA estate then Mr. Picard no longer has a basis to
6 bring these adversary proceedings against the innocent net
7 losers -- the innocent net winners. And what I'm trying to
8 say to the Court is because --

9 THE COURT: I understand what you're saying.

10 MR. KLEINHENDLER: -- at a minimum --

11 THE COURT: You're saying that I look at
12 insolvency today and I should stay this proceeding to see if
13 there's enough money to pay the customers in this case.

14 MR. KLEINHENDLER: And here's why. If you look at
15 the analysis that you go through and to consider whether to
16 stay, what are the plaintiffs -- you know, what's -- is
17 there a hardship to the plaintiff, is there a hardship to
18 the defendant, what's judicial economic? Let's go through
19 those factors.

20 THE COURT: Well, there's certainly a hardship to
21 people who are awaiting distributions.

22 MR. KLEINHENDLER: Why would there be a hard --
23 first of all, Mr. Picard is not making any distributions, he
24 hasn't even distributed the nine billion that he has in the
25 bank, so holding off on the distributions from these

1 innocent investors -- these innocent net winners are not
2 going to slow down the payday --

3 THE COURT: The net winners are not going get any
4 distributions.

5 MR. KLEINHENDLER: No, no. What happens is right
6 now I represent ten net winners. The trustee is coming
7 after my people. What I'm saying to this Court is what is
8 the rush to disgorge money from my people if at the end of
9 the day there's plenty of money to pay off all the net
10 losers from what Mr. Picard already has in the bank plus
11 half of what's in the net -- of the Madoff victims fund,
12 which has already been stated that one of the key tenants of
13 the Madoff's victim fund is to make whole net losers.

14 Yes, they will make whole or they will try to
15 reimburse other losers, those people that might have
16 invested indirectly, those people that might have slept on
17 their rights and not have made a timely claim in this
18 proceeding.

19 But my point to Your Honor is, what's the rush?
20 How is it -- how is it judicially efficient to prosecute all
21 of these claims, force innocent net winners to pay money for
22 discovery, to incur further legal fees, having to disgorge
23 assets, sell assets. Many of these people are elderly
24 people, you've heard some of that from the argument today.
25 Why should we do that in a -- today when the horizon for the

1 customer rest is already -- may be whole.

2 And so my point is, let's stay these adversary
3 proceedings, there's no -- there's no prejudice to the
4 plaintiff, there's substantial prejudice to the defendants.
5 As far as judicial economy why inundate this Court with all
6 these adversary proceedings when we can focus on larger
7 issues?

8 And, Your Honor, there's another thing that I need
9 to bring to the Court's attention. Mr. Picard has said in
10 his paper, what's the problem? We'll go after these net
11 winners, they'll pay in, they'll get on line in the general
12 estate, and if there's money left over we'll just give it to
13 them in the general estate. Well, there's a big wrinkle
14 there, and that is SIPC has advanced over \$900 million to
15 pay Mr. Picard's firm and all the expenses. They can't
16 recover that from the SIPA estate, but once it becomes a
17 general estate they get on line to recover 900 million
18 before the ultimate net winners can get their money back as
19 general creditors. And so why should we now incur further
20 legal fees to pursue these adversary proceedings, which may
21 not be needed at all, and incur far more SIPA cost which
22 will ultimately be sought to be recovered?

23 THE COURT: I got it. Let me hear from the
24 trustee.

25 MR. KLEINHENDLER: Uh-huh.

1 THE COURT: Thank you.

2 MR. CREMONA: Thank you, Your Honor.

3 We discussed this issue a little while back when
4 we were talking about intervention on the very issue of
5 whether Mr. Picard has standing under 78ffff(2)(c)(3) and the
6 appropriate time to value the customer property fund. As I
7 said then and as we said in our papers the appropriate time
8 is the filing date.

9 THE COURT: Well, let's assume he's right and the
10 appropriate time is today.

11 MR. CREMONA: Well --

12 THE COURT: He's arguing there's probably -- there
13 seems to be enough money to pay all the net losers in full,
14 so why not wait until all of these funds are distributed?

15 MR. CREMONA: Because that's simply not even close
16 to accurate, Your Honor.

17 THE COURT: Tell me why.

18 MR. CREMONA: As of right now today the total
19 number of recoveries is roughly 9.8 billion, the total net
20 equity claims for net losers that filed the claims 17.6
21 billion. So we are a long way from that. And I think we
22 need to put aside the fact that there's -- we keep bringing
23 up the victim fund.

24 As Your Honor noted that is a separate fund
25 administered by a separate fiduciary and will deal with

1 separate claimants that are not customers within this
2 proceeding, and that's the point as Your Honor said --

3 THE COURT: But it'll also deal with customers
4 won't it? In other words, any victim has a right -- is
5 eligible to participate in that fund.

6 MR. CREMONA: I guess that remains to be
7 determined, but as Your Honor pointed out it is two
8 different bodies -- two entirely different proceeding as we
9 -- as we talked about when we talked to Mr. Ellis here. I
10 mean his claim is as against the victim fund not here, and
11 Your Honor noted the distinction between the proceedings.

12 So I don't think that at all comes into the
13 equation, and the numbers I just gave you, which by the way
14 I'd like to reserve my right, I do think the appropriate
15 time to value the customer property is on the filing date --

16 THE COURT: Okay.

17 MR. CREMONA: -- on the filing date we had
18 \$960 million in assets on hand, and, you know, billions in
19 claims.

20 So, I think it's clear, even if what they said was
21 true and the date moves, which it shouldn't, I would also --
22 as I said then, I will say it again now, we had some
23 guidance on this issue from Judge Rakoff in the Flynn
24 decision. Judge Rakoff looked at it, did not withdraw the
25 reference, candidly it was in a different context, we were

1 looking at withdrawal, but in that context cited that once
2 it is so well settled that the valuation of the customer
3 property fund is on the filing date that I don't need to
4 withdraw the reference because it's clear application of the
5 SIPA statute, and I would submit that the result should be
6 no different here, Your Honor.

7 THE COURT: Thank you.

8 MR. CREMONA: Thank you.

9 MR. KLEINHENDLER: Your Honor, if I could respond
10 to --

11 THE COURT: Briefly to what he -- what he said.

12 MR. KLEINHENDLER: Exhibit C to my papers, Your
13 Honor, are blow ups of -- or portions of the Madoff website,
14 which Mr. -- which Mr. Picard runs, and it says here
15 clearly, "Total value of allowed claims \$11.4 billion."
16 There is deemed determined pending litigation 155 claims,
17 but there is no value asserted to that at all. Mr. Picard
18 has taken the position that none of these claims are valid.

19 And I cite to you, Your Honor, in my briefs the
20 law that guides your decision here.

21 And by the way, everything that Mr. Cremona said
22 is not in his papers, it's not in the submission before you,
23 so if they want to put in a supplemental papers to talk
24 about this \$17 billion number that doesn't appear anywhere
25 we could deal with it.

1 But the motion before you has what I put before
2 you and what they put before you, and those numbers are not
3 before you.

4 But I want to just get to the legal issue, the
5 legal --

6 THE COURT: You can just reply to what he said,
7 you don't have to repeat an argument you made in your
8 original presentation. That's not the purpose of a
9 rebuttal.

10 MR. KLEINHENDLER: He also said that -- that the
11 law that guides you is based on the Flynn decision that
12 Judge Rakoff decided. Judge Rakoff did not make a decision.

13 THE COURT: But he decided not to withdraw the
14 reference because the law was well settled. Why isn't that
15 a decision?

16 MR. KLEINHENDLER: He did not say the laws were
17 settled, he referred to a New Jersey case.

18 THE COURT: Bevel.

19 MR. KLEINHENDLER: But I'm referring to second
20 circuit precedent, that's why I want to just bring your
21 attention to on page 3 of my reply, and that is very clearly
22 that standing must be present during the entire time of a
23 litigation. Even if there was standing at the beginning of
24 a litigation, if it's lost during the litigation court loses
25 Article 3 standing.

1 The facts that were attendant when Judge Rakoff
2 decided Flynn in 2011 are not the facts we have today that
3 I've presented. There was no \$9.5 billion --

4 THE COURT: But Judge Rakoff decided that he
5 determines -- well, he decided I thought that you determine
6 standing as of the date -- of the filing date of the SIPC
7 proceeding.

8 MR. KLEINHENDLER: He said he withdrew -- he said
9 I'm denying the motion because there is some authority that
10 says you can -- a trustee can -- you can look at what the
11 trustee believes to be the liability to the estate at the
12 date of filing.

13 What I'm saying is the second circuit, and there's
14 a long -- that might have been true at the time of filing,
15 but if today there is no more -- there is no more injury
16 because there's enough money in the bank you don't go back
17 to what they said at the beginning of the filing, you
18 sometimes bring a case, but during the course of the case
19 you can lose standing, and that's what the second circuit
20 has said in Altman versus Bedford Central School, 245 F.3d
21 49, Second Circuit '01.

22 The other legal point that I want to stress is --
23 I'm going read to you from another second circuit case, and
24 this is Martin versus SEC, 734 F.3d 169 at 173, Second
25 Circuit 2013.

1 In order to have standing he has to make "concrete
2 and particularized and actual or imminent, not conjectural
3 hypothetical damages."

4 The only excess funds that the trustee has claimed
5 might be required beyond what's already in his bank account
6 and the Madoff victims fund is what potentially could become
7 liable from these 155 pending cases, but the trustee has
8 taken the position in this court that those claims are not
9 valid. He has told this Court that there is no liability to
10 those claims.

11 So again, I -- I am approaching the Court's
12 sensibility and the Court's discretion under 105 of the
13 bankruptcy code, this is the thrust of it. Do we want to
14 put my ten cases, which include elderly people, through the
15 rivers and expense of discovery and a trial and a judgment
16 and all that when we could just sit back and see how this
17 Madoff's victim fund is distributed, it's already -- all the
18 claims have been in since April, the money is there, let's
19 see if there are any net losers at the end of that
20 distribution, let's see if there really are a substantial
21 amount of additional claims left, and then we can pursue the
22 remaining adversary proceedings.

23 It would also, Your Honor, materially inform any
24 settlement, right? If we know -- and even from the
25 trustee's perspective -- if he knows that at the end of the

1 day there's a very small amount of money that he needs to
2 close out the estate that may affect how he's going to
3 settle cases. Right now he's not before very generous in
4 settling, but if he doesn't need all that money he may be
5 able to settle better. That goes to the judicial efficiency
6 argument.

7 It is just more efficient to preside over this
8 case in this manner when all that cash is sitting there
9 rather than incur further fees by the trustee and have this
10 lorass (sic) of 750 adversary proceedings chugging along
11 when at the end of the day it might not be necessary.

12 THE COURT: Thank you.

13 MR. CREMONA: Can I just clarify something? Just
14 to clarify what was said in Flynn. I'll just read to you
15 what the Court said.

16 "First Greiff argues that the trustee cannot bring
17 avoidance actions under SIPA because that statute permits
18 him to do so only whenever customer property is not
19 sufficient to pay the claims in full. The grief claims that
20 as a factual matter the trustee has already recovered enough
21 customer property to pay all the claims he has recognized
22 and thus cannot avail himself over the avoidance powers,
23 which SIPA bestows contingently.

24 But it has been long held that the fund of
25 customer property shall be valued for purposes of 15 U.S.C.

1 Section 78fff(2)(c)3 as of the filing date," Bevel Bresler
2 (ph).

3 I would just like to quickly address the harm and
4 the prejudice to the trustee if these cases were stayed.

5 As I mentioned, Your Honor, earlier we're six
6 years into these proceedings, net loser victims would
7 certainly take the position that staying these proceedings
8 and preventing them from receiving distributions would be
9 tremendously harmful.

10 Putting that aside I think six years have gone by,
11 records are expiring, discovery is not moving forward, the
12 trustee's claim will be prejudiced if this case is stayed
13 any further.

14 As I started I will finish, we are six years in,
15 we are four years into these adversary proceedings and in
16 many cases in the nation stages, I implore Your Honor to let
17 these cases move forward and prevent any further prejudice
18 to the trustee, and more importantly, to the net loser
19 victims.

20 Thank you, Your Honor.

21 THE COURT: Thank you. Are there any other
22 issues?

23 MR. LEVY: Your Honor, I have just one
24 housekeeping issue.

25 A number of the motions that were made had what I

1 think Your Honor has called one off kinds of issues, some
2 that may be common to a number of issues, some that may be
3 common to individuals, and I'm not sure how Your Honor
4 intended to proceed on that.

5 THE COURT: Well, are you talking about the
6 objections to personal jurisdiction and --

7 MR. LEVY: I was just looking at a brief I had. I
8 had an argument for one client that there was an improper
9 aggregation of an old -- of a pre-2004 customer with a post-
10 2004 customer. Issues of that nature.

11 THE COURT: Is that the inter account transfer
12 type of case?

13 MR. LEVY: It's really what I called aggregation
14 of what I believe to be two separate customers under the
15 rubric of one customer in calculating the alleged avoidance
16 liability. That's just an example of an issue of that
17 nature.

18 THE COURT: But there has been an argument that
19 the complaint -- or the complaints improperly aggregate
20 defendants, that argument was made. Isn't that what you're
21 arguing now?

22 MR. LEVY: No, Your Honor, I'm not sure I'm
23 arguing aggregation of defendants in that sense.

24 In this particular complaint the complaint is
25 Picard versus X. The account on which X's liability is

1 predicated had company Y as the customer of record from
2 let's say 1995 to 2004. Then there's a change. New
3 customer of record, new client number.

4 THE COURT: Is this Martin that --

5 MR. LEVY: Yes, Your Honor, it is.

6 THE COURT: Oh, okay.

7 MR. LEVY: Exactly. Exactly. It's not really an
8 -- it's not really a lumping of different customers
9 together, it's an aggregation of what we believe to be two
10 separate customers under the SIPA --

11 THE COURT: Well, I thought that the complaint
12 alleged that it was the same customer and there was a name
13 change, that's my recollection looking at that.

14 MR. LEVY: I don't remember whether it said that,
15 Your Honor, but --

16 THE COURT: Do you remember --

17 MR. LEVY: -- the account statements show
18 differences.

19 THE COURT: It shows the Martin Family Trust --

20 MR. LEVY: Martin Family Trust, Martin Family
21 Limited Partnership.

22 THE COURT: I thought it said it was a name
23 change. I don't --

24 MR. CREMONA: That sounds accurate, Your Honor, I
25 don't remember specifically, but my understanding was that

1 those types of issues were covered by these proceedings.

2 We had identified -- just to respond to Mr. Levy
3 and for everyone's awareness about eight issues that we felt
4 -- eight cases that we felt had what we refer to as
5 aberrational issues that weren't otherwise covered here
6 pursuant to Your Honor's scheduling order such as personal
7 jurisdiction, non-claim, and the like, and we have
8 separately reached out to counsel. Some have said they
9 didn't want to participate and don't want a hearing, others
10 on the non-claim statute we are trying to coordinate
11 hearings. I did not view this issue as one that required a
12 separate hearing.

13 THE COURT: Well, why don't we do this. If
14 there's anybody who thinks -- and I'll hear you -- anybody
15 who thinks that they have an issue to argue that's not
16 separated out of today's proceedings I'll hear them now.

17 MR. LEVY: May I have a moment, Your Honor?

18 THE COURT: Sure. I remember the issue to which
19 you were just referring.

20 MR. LEVY: It's adversary number 10-4348. I just
21 want to look for a minute, Your Honor, to determine whether
22 I can rest on the papers or whether I want to make an
23 argument.

24 THE COURT: Okay.

25 (Pause)

1 MR. LEVY: The only point that I think I would
2 make, Your Honor, is that change of name, it's a change from
3 a trust to a limited partnership. There's a difference in
4 the nature of the entity, and the SIPC doesn't provide for
5 if difference.

6 THE COURT: How is it different than an inter
7 account transfer type case where one -- one customer
8 transfers -- the transferor is one customer and the balance
9 in the account or some amount in the account is transferred
10 to the transferee?

11 MR. LEVY: In this instance, Your Honor --

12 THE COURT: And what's the -- I'm sorry, what's
13 the number on the --

14 MR. LEVY: 4348.

15 THE COURT: Go ahead.

16 MR. LEVY: In this instance, Your Honor, if I
17 recall correctly, the trustee suggests that at 2004 client
18 was already negative to the tune of something like
19 \$37 million negative. There's no -- there's nothing that
20 travels on an inter account transfer to the new customer,
21 it's zero. So you start effectively from zero for new
22 customer.

23 The liability changes dramatically, it reduces
24 from the overall number that the trustee alleges to be
25 something on the order of \$52 million -- \$40 million for two

1 years or \$52 million for six years to a considerably lesser
2 number.

3 If in fact they're two different SIPA customers
4 under the SIPC rules the liability is dramatically
5 different.

6 THE COURT: So you're saying if the transfer
7 account was negative then the account starts at zero rather
8 than at a positive number.

9 MR. LEVY: Exactly right. Because under the --
10 the way the trustee has always done the calculation if there
11 was no equity there was nothing to be transferred. We're
12 talking about two different customers.

13 THE COURT: Mr. Cremona?

14 MR. CREMONA: Your Honor, I view it more as a
15 inter account transfer type issue as you first eluded to.

16 THE COURT: Well, but maybe with respect to those
17 kind of issues if the account was zero at the time of the
18 purported transfer how can it be anything less than zero?

19 MR. CREMONA: I'm trying --

20 THE COURT: You know, I recollect that I looked at
21 complaints or charts to complaints that after you -- in
22 these inter account transfer cases you might start with a
23 negative number because there was no net equity, and
24 Mr. Levy is saying that number should be zero, it shouldn't
25 be zero. At most it should be zero, right?

1 MR. LEVY: Your Honor, you can look at the -- you
2 can look at the chart at the back of the complaint, take,
3 for example, a transfer in the predecessor customer's
4 account, January 31, 1997, transfer from account number
5 12345, no value ascribed to it.

6 THE COURT: Well, if it was zero there's no value
7 ascribed to it. I thought you were saying --

8 MR. LEVY: But that's exactly the point I'm
9 saying, it's as if --

10 THE COURT: -- that there's a negative number
11 ascribed to it.

12 MR. LEVY: But the transfer isn't of the negative,
13 the transfer is zero because there's no equity that can be
14 transferred.

15 THE COURT: But here it's not changing the balance
16 in the account, it's treated as a zero.

17 I thought you were saying that if there was a
18 negative number in the transfer -- transferor's account that
19 negative number was then transferred, for lack of a better
20 phrase --

21 MR. LEVY: No, I'm not suggesting that at all,
22 Your Honor.

23 THE COURT: Oh, okay. All right. So what are you
24 arguing?

25 MR. LEVY: I'm suggesting, Your Honor, that you

1 had customer A as a separate customer for a SIPC rules --

2 THE COURT: Right.

3 MR. LEVY: -- which was the Martin Trust who had
4 ins and outs during the pre-2004 period, which resulted in
5 under the trustee's calculation a net \$37 million figure.

6 Then you have a new customer, Martin Family Limited
7 Partnership who's now in the account. If it's an inter
8 account transfer you can't transfer negative
9 \$37 million and the trustee never does that, he transfers
10 zero because he says there's no net equity in the
11 predecessor transferor's account.

12 THE COURT: But under the trustee's calculations
13 what's wrong with that? That's better than transferring
14 negative 37 million.

15 MR. LEVY: I start at zero as opposed to negative
16 37 million.

17 THE COURT: Well, that's what I'm asking. Are you
18 starting at zero --

19 MR. LEVY: Yes.

20 THE COURT: -- a negative 37 million --

21 MR. LEVY: Yes, I'm a separate customer.

22 THE COURT: Pardon?

23 MR. LEVY: My -- the successor -- the second
24 customer of record on the account it should be starting with
25 zero because it's a separate customer. He gets no benefit,

1 he gets nothing from a negative transfer.

2 THE COURT: Okay. That's what I'm trying to
3 understand from your argument. Are you saying that under
4 the trustee's method you're starting -- the second customer,
5 the transferor is starting with a negative number?

6 MR. LEVY: I think the trustee is calculating in
7 that way and I'm suggesting that's wrong.

8 THE COURT: I'm just asking you is the transferor
9 starting with a negative number based upon the insolvency or
10 the insufficiency in the transferor account?

11 MR. LEVY: The transferor had a negative number --

12 THE COURT: Right.

13 MR. LEVY: -- which the trustee -- which the
14 trustee assigns to the --

15 THE COURT: That same negative number or zero?

16 MR. LEVY: Yes, same negative number.

17 MR. CREMONA: That is a net investment method in
18 an inter account transfer situation, Your Honor. I mean
19 that -- that is us tracking the negative net equity in one
20 account, and this is the specific issue that was
21 addressed --

22 THE COURT: How can it get less than nothing? I
23 understand with the same account, but how can you get less
24 than nothing from your transferor?

25 MR. CREMONA: But if an account has a negative net

1 equity and then it's transferred or there's a name change
2 that negative net equity follows the account. I mean that
3 is exactly what -- that's exactly what --

4 THE COURT: But if I had a negative net equity of
5 \$1 million and I transfer my account to you, are you saying
6 that you then get a negative net equity of \$1 million or
7 it's just zero? Because my transfer has no value to it.

8 MR. CREMONA: I -- that is a different factual
9 scenario I think than what happened here. I think this was
10 a family limited partnership where you had a transfer --

11 THE COURT: Well, let me get back to the inter
12 account transfers, and I'd have to look at the pleadings
13 again, but are you -- when the trustee computed the starting
14 number for the transferee account that an inter account
15 transfer, are those ever negative?

16 MR. CREMONA: I'm sorry, Your Honor, can you say
17 that again?

18 THE COURT: When the trustee computed the starting
19 value of the transferee account following an inter account
20 transfer, or the value of the transfer for that matter if
21 it's an existing account, and the transferor had no equity
22 in his account, had a negative number, was that negative
23 number assigned to the transferee account or was the number
24 zero assigned as to the value of the transfer?

25 MR. CREMONA: I think under that scenario it would

1 be zero. That's not the scenario here though, this is the
2 same account number, it's just a name change on the account.

3 THE COURT: Okay. Well, that's what I thought
4 about --

5 MR. LEVY: It's two --

6 THE COURT: -- but I was asking a different
7 question.

8 MR. LEVY: It's two different customers. It's a
9 trust and it's a family limited partnership.

10 THE COURT: But it's the same account, and
11 apparently it's just the transferring the account.

12 MR. LEVY: But if we're treating it as an inter
13 account transfer between one customer and another, Your
14 Honor, then we're not being -- we're not being consistent,
15 and if it was --

16 THE COURT: I don't see how you suddenly create
17 value by changing the name on an account. It's one thing if
18 they treated it as zero, but this is the same account, it's
19 not a different account.

20 MR. LEVY: These are two different customers under
21 the SIPC Part 300 rules, that's the point.

22 THE COURT: They seem to have the same account.

23 MR. CREMONA: Your Honor, I would submit that that
24 is precisely what was prescribed by the antecedent debt
25 decision on inter account transfer. The transfer -- the

1 name change cannot transform fictitious profits into
2 principal when it's the same account.

3 THE COURT: Right. There's a difference between -
4 - there's a difference between a name change of the same
5 account and a transfer from customer A to customer B.

6 MR. CREMONA: I agree with that, Your Honor, but
7 that's not what happened here.

8 MR. LEVY: But, Your Honor, what they're trying to
9 do is attribute the transfers to a predecessor customer to
10 the successor customer.

11 THE COURT: It's the same account though.

12 MR. LEVY: It's two different entities.

13 THE COURT: That's like saying -- that's like
14 saying you can cure all of the deficiencies in a negative
15 account by just changing the name. That is the same
16 account, but a different customer.

17 MR. LEVY: All I can say, Your Honor, is under the
18 SIPC rules it's two different customers, and you can't
19 aggregate two different customers.

20 THE COURT: Well, I understand for the purposes of
21 the \$500,000 or whatever it's two different customers.

22 MR. LEVY: It's how customers are treated, and
23 that's how net equity is being treated here, and that's how
24 customer status is determined under the statute, and if
25 you're going to suggest that we have -- our customer -- our

1 property is to be recovered as customer property then there
2 has to be consistency in the application of the definitions
3 here.

4 MR. CREMONA: Your Honor, I think one of the --
5 and I'll let my colleague from SIPC speak to it -- but the
6 idea is if the account is held in the same capacity that is
7 determinative. This is the same account.

8 MR. LEVY: It's not the --

9 THE COURT: All right.

10 MR. CREMONA: The capacity doesn't change.

11 THE COURT: I understand. I'll have to look at
12 the pleading. If it pleads it's the same account then it
13 pleads it's the same account and maybe you'll be able to
14 show that it's a different account and the numbers should
15 have been computed differently.

16 All right? Anybody else have an issue that they
17 believe is -- should be presented today?

18 Hearing none I reserve decision and we're
19 adjourned.

20 Thank you very much.

21 (Proceedings concluded at 5:36 PM)

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CERTIFICATION

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3 I, Sheila G. Orms and Dawn South, certify that the
4 foregoing is a correct transcript from the official
5 electronic sound recording of the proceedings in the above-
6 entitled matter.

7

8 Date: September 19, 2014

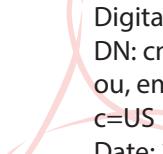
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